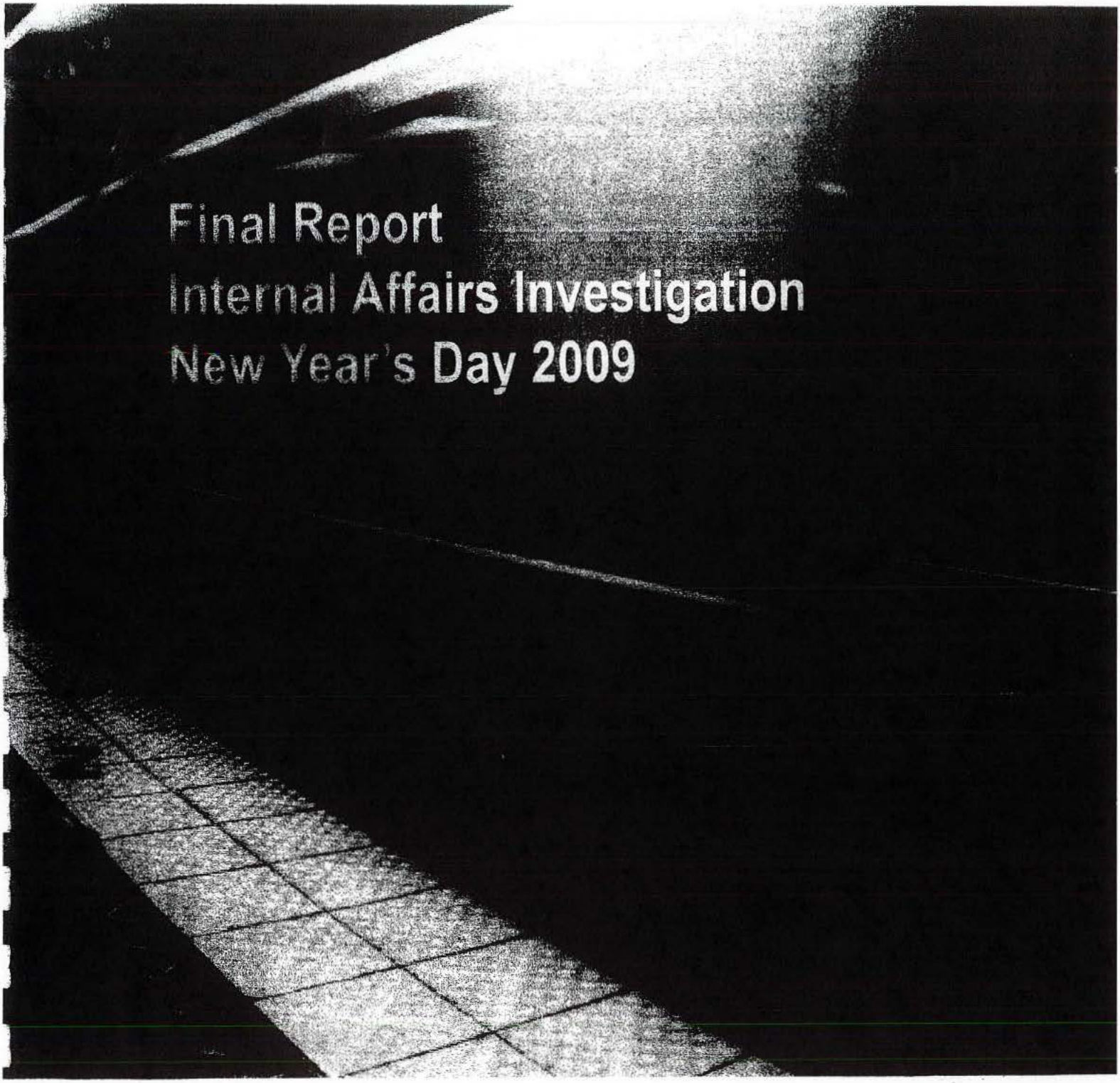


Final Report
Internal Affairs Investigation
New Year's Day 2009

Submitted to:

BART

[redacted]

Prepared by:

meyers | nave
professional law corporation

meyers | nave riback silver & wilson
professional law corporation

MEMORANDUM

CONFIDENTIAL COMMUNICATION

DATE: July 31, 2009

TO: Matthew H. Burrows, General Counsel
Dorothy Dugger, General Manager
Gary Gee, Chief of Police

FROM: Kimberly E. Colwell, Esq.
Jayne W. Williams, Esq.

RE: **Final Report BART Internal Investigation re January 1, 2009 Fruitvale BART Station (Oscar Grant) Incident**

Attached is the Final Report of the Internal Affairs Investigation of the January 1, 2009 Fruitvale BART Station (Oscar Grant) incident. Enclosed are the Final Report and Exhibit Volumes 1-3.

FINAL REPORT

BART INTERNAL INVESTIGATION

JANUARY 1, 2009 FRUITVALE BART STATION

OSCAR GRANT INCIDENT

Submitted to:

BART

Prepared By:

meyers | nave
professional law corporation

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I. DATE OF INCIDENT

January 1, 2009

II. TIME PERIOD OF INVESTIGATION

February 11, 2009 – July 31, 2009

III. NATURE OF INVESTIGATION

This is the final report of the Internal Affairs Investigation of the officer involved shooting and death of Oscar J. Grant, III that occurred at approximately 2:00 a.m. on January 1, 2009 at the Fruitvale BART Station, Oakland, California. Violations of the following polices were at issue:

General Order No. III, General Duty Regulations (Exhibit 1)
General Order No. V, Weapons and Use of Force (Exhibit 2)
Operational Directive No. 27, Code of Professional Conduct and Responsibilities for Peace Officers (Exhibit 3)
Operational Directive No. 44, Processing and Handling Arrestees (Exhibit 4)
Operational Directive No. 70, Delay of Revenue Trains (Exhibit 5)
Operational Directive No. 74, Lethal Force/Incidents Resulting in Death or Great Bodily Injury (Exhibit 6)
Operational Directive No. 75, Use of Lethal Force (Exhibit 7)
Bulletin No. 08-07, Taser Less-Lethal Weapon Policy (Exhibit 8)

IV. EMPLOYEES INVOLVED AND INVESTIGATED

The BART Police Officers Whose Conduct and Performance In This Incident Constitutes The Primary Focus of This Investigation Are:

[redacted]

Officer Noel Flores, Badge # 552
BART Police Department

Officer Jonathan Guerra, Badge # 508
BART Police Department

Officer Emery Knudtson, Badge # 533
BART Police Department

Officer Anthony Pirone, Badge # 514
BART Police Department

Officer Jon Woffinden, Badge # 547
BART Police Department

V. INCIDENT SUMMARY

On December 31, 2008, thousands of Bay Area residents, in a festive and celebratory mood, made their way into San Francisco to bring in the New Year. In anticipation of a heavy and enlarged demand for ridership on the Bay Area Rapid Transit (BART) System, BART management expanded its hours and frequency of operation of its trains and increased the frequency of access to trains into and out of San Francisco. In addition, and in readiness for expected crowd-control problems, a high volume of calls and likely security demands, the BART Police Department (BART PD) developed and implemented an operations plan that emphasized maximum deployment of personnel resources.[1]

At approximately 2:00 a.m. (January 1, 2009) BART train operator, K[redacted] W[redacted] reported to Central Dispatch that there was a disturbance in the lead car on the Dublin-Pleasanton Train. The operator reported that the fight involved one (1) Black male wearing all black, one (1) White male and one (1) Latin male and that there were no weapons. Subsequently, BART Central advised BART PD of a "(l)arge group of Black males, all black clothing. No weapons, still fighting."[2]

BART PD Officers Pirone and Domenici, working unit 1B10, were the first to respond to the call as they were already dealing with an unrelated incident at the Fruitvale Station where the train was stopped. Officer Pirone, followed later by Officer Domenici, proceeded to the Station platform. The train, crowded with passengers, was ordered to remain stopped at the Fruitvale Station. Within minutes, seven BART PD officers had responded to the Station platform, including former Officer Johannes Mehserle. From the moment BART PD officers congregated at the scene there was confusion, chaos and pandemonium on the platform for some thirteen (13) minutes; most of this was captured by several video camera devices belonging to passengers and security cameras installed at the Station by BART. Several videos filmed by the passengers have been turned over to authorities. These videos have been examined by the team contracted to conduct this investigation. In our effort to achieve maximum accuracy of the depiction of the critical scene captured on the videos, we retained the services of Stutchman Forensic Laboratory, a reputable video expert whose task was to enhance the video footage to produce a comprehensive reconstruction and depiction of the actions of the officers and detainees. This enhancement and timeline has been invaluable to the analysis and investigation of this incident.

Over the next thirteen (13) minutes, BART PD detained at least six persons (the detainees) who were believed to be involved in the reported disturbance on the train, including Mr. Oscar J. Grant, III. During the course of the detention, a fracas and physical altercation involving Officer Pirone, Officer Mehserle, Officer Domenici, Grant and other detainees ensued. This fracas is shown on the video and statements made by witnesses also corroborate the event. Although there are conflicting statements as to the exact cause of the fracas and who initiated it, the evidence shows that Officer Pirone, in particular, by his conduct and inappropriate verbal statements, contributed substantially to the escalation of the volatile atmosphere on the platform. During the course of this fracas, and as chaotic as the scene was on the platform, at least three things are manifestly apparent: (1) At some point Grant was prone on the platform face down; (2)

[1] BART Police Department Operations Order 08-15, Issued 12-17-08, Page 1 (Exhibit 9).
[2] Transcription of Dispatch Tapes (p 1:22-23) (Exhibit 10).

Officer Mehserle is shown in the video standing over Grant; and (3) Officer Mehserle is shown reaching for his service revolver and firing one round into the back of Grant. Grant was transported to the Alameda County Medical Center where he died approximately nine hours later.

As is mandated by BART PD procedure and protocol, an officer involved shooting investigation was immediately initiated. The Oakland Police Department, working in conjunction with the Alameda County District Attorney, assumed investigative responsibility for the criminal investigation of this incident, including any possible criminal misconduct by BART Police officers. Initially, the BART Police Department management assumed the administrative (Internal Affairs) investigation responsibility into this incident.

There was community outrage following the shooting of Grant. The video footage that had been captured by some of the passengers was widely disseminated throughout the news media and on the internet. There were protests and civil unrest, particularly in Oakland. Some were of the belief that race played a part in the Grant shooting. Grant was African American. Mehserle is white. Justifiably or not, this incident has racial overtones. BART PD often conducts policing operations in minority communities. The incident tore at the fabric of understanding and cooperation between the BART PD and the community. Demands for an immediate independent investigation were made.

VI. TIMELINE OF EVENTS AND ACTIONS BY BART PD AND DETAINEES

Source: Platform clock at Fruitvale BART Station; video footage enhancement by Gregg Stutchman, Stutchman Forensic Laboratory[3]

Train arrives at Fruitvale Station.	01:59:06
Passengers deboard train.	01:59:20-02:01:00
Train operator notifies BART Central. Passenger reported fight on lead car.	02:01:59
Train operator notifies BART Central. Fight involved 1 black male wearing black, 1 white male and 1 Latin male. No weapons.	02:02:48
BART Central advises BART PD. "Large group of black males, all black clothing. No weapons, still fighting."	02:03:04
Pirone arrives on platform walking through group of people.	02:04:03
Group Pirone walks past reenters train car number 4.	02:04:26
Domenici arrives on platform.	02:06:09

[3] Photos of timeline events are attached as Exhibit 11.

Grant taken off train.	02:06:45
First four detainees seated on ground.	Exact time unknown
First physical confrontation with Grant by Pirone.	02:08:43
Mehserle and Woffinden arrive on scene.	02:08:54
Guerra arrives on platform.	02:09:23
Grant on cell phone, seated on platform.	02:10:09
Pirone returns from talking to the train operator.	02:10:12
Grant getting up from ground.	02:10:14
Knudtson and Flores arrive on platform.	02:10:51
Pirone's second physical confrontation with Grant. Beginning of Grant's takedown.	02:10:55
Mehserle briefly reaches for firearm but does not remove it.	02:10:59
Mehserle trying for Grant's right arm.	02:11:14
Mehserle reaches for firearm and removes it from his holster.	02:11:17
Pirone right hand on Grant's right arm.	02:11:20:13
Pirone's right hand still on Grant's right arm.	02:11:20:53
First video frame showing Grant's right arm.	02:11:20:73
Grant's right forearm on back. Pirone beginning to rise.	02:11:21:40
Grant's right arm still on back.	02:11:21:53
Pirone's hand off Grant's head. First video frame showing Grant's arms in air.	02:11:21:87
Both Grant's hands touching at his rear waistband area. Both hands in standard cuffing position.	02:11:21:93
Shot fired.	02:11:22:00
Gun muzzle can be seen on video between Pirone's arm and body.	02:11:22:13

Mehserle hands to head.	02:11:27
Pirone dispatches code 3 medical call for gunshot wound.	02:11:36-02:11:50
Officers herd people onto train.	02:12:21
Train departs Fruitvale Station.	02:12:47
Guerra arrives with trauma kit.	02:13:25
Knudtson and Mehserle talking on platform.	02:16:08
Knudtson and Mehserle talking on platform.	02:16:22

VII. PURPOSE, SCOPE AND OBJECTIVE OF THIS INVESTIGATION AND REPORT

This is an Internal Affairs Investigation that examines and analyzes the New Year's Day incident at the BART Fruitvale Station in which a BART PD shooting resulted in the death of Oscar J. Grant, III. This investigation examined and analyzed the conduct and performance of the BART PD officers who were present at the scene of the incident; it examined and analyzed as well the BART PD officers' response and conduct on the platform and the officers' actions immediately following the incident. The frame of reference for this examination and analysis of the BART PD conduct and performance in this incident is the accepted and recognized standard of review that is generally accepted within the law enforcement profession regarding police tactics; additionally, the BART PD conduct and performance was examined and analyzed against the BART PD policies and procedures, applicable California law regarding the use of force and police procedures. The primary focus and purpose of this investigation was to determine whether any of the BART PD officers violated any pertinent BART policies and procedures, and if violations did occur whether they warranted appropriate administrative discipline. If the investigation revealed that violations did occur, recommendations have been made for the appropriate discipline and administrative action.

In addition, a review and analysis was made into the BART PD practices, policies and procedures pertaining to the use of force reporting, conducting internal investigations and overall best practices in police management. Where the review of these areas showed a need for improvement, appropriate recommendations have been made.

This investigation was conducted consistent with applicable California laws, including the provisions of California Government Code § 3303 *et seq.*, commonly referred to as the "Public Safety Officers Procedural Bill of Rights Act (POBAR)." In addition, findings and recommendations contained in this report were made consistent with BART "Positive Discipline Guidelines": Operational Directive No. 77[4] and Employee Relations Guideline No. 21.

[4] Operational Directive No. 77 is attached as Exhibit 12.

As part of the review process, all documents, including the statements of witnesses, police reports, BART PD policies relative to use of force and personnel management, training records, internal affairs investigations, personnel documents, autopsy reports, and videos taken during this incident were reviewed and analyzed. Additionally, lesson plans and model policies from Taser International and the International Association of Chiefs of Police were examined.

The BART officers who were the focus of this investigation were individually advised that they were being investigated regarding their conduct at the Fruitvale BART Station in the early morning hours of January 1, 2009 during the events surrounding the shooting death of Oscar Grant.

Officer Pirone was informed that he was being investigated for all of his actions and omissions on the morning of the incident from the time he got the call to respond until he went off shift. Specifically, Officer Pirone's conduct and performance in the following areas was thoroughly and rigorously investigated: (1) His response to the call; (2)The deployment and use of officer back up; (3) Whether proper considerations were made for officer safety in responding to the scene; (4) Whether there was appropriate command communicated regarding the use of the Taser; (5) The appropriateness and propriety of his interaction with the public, particularly and including, his swearing and use of improper and offensive language; (6) Whether his use of force with his hands on several of the detainees in the train and on the platform was necessary and appropriate; (7) Whether his arrest and detention techniques were proper and appropriate; and (8) Whether his overall demeanor and treatment of suspects and the public exacerbated a tense and chaotic atmosphere.

[redacted]

Officers Flores, Guerra, Knudtson and Woffinden were informed that they were being investigated for all of their actions and omissions on the morning of the incident from the time they got the call to respond until they went off shift. Specifically, Officers Flores, Guerra, Knudtson and Woffinden were each investigated regarding the following matters: (1) Their response to the call; (2) Their use of officer back up and coordination with their partner(s); (3) Considerations of officer safety in responding to the scene; (4) Command communications regarding the use of their Taser and/or their baton; (5) Their interaction with the public, including and particularly, their swearing and, or their use of improper language; (6) Their use of force against any individuals or detainees on the platform; (7) Their arrest and detention techniques; and (8) Their treatment of suspects and the public.

Each of the officers whose conduct and performance is a focus of this investigation was interviewed by the Investigators (Officers Domenici, Flores, Guerra, Knudtson, Pirone and Woffinden). The officers were represented by legal counsel who was present during the course of their interviews. Former Officer Johannes Mehserle was not interviewed.[5]

All of the witness detainees were interviewed by the Investigators as part of this investigation (A[redacted] J. B[redacted] N. E[redacted] G[redacted] and R[redacted]).

The key BART employee was interviewed in connection with the investigation, the Train Operator, K[redacted] W[redacted]

Numerous other witnesses and individuals with information regarding the incident were interviewed during the course of the investigation. A complete summary of the witnesses who were interviewed accompanies this report as Exhibit 13.

[5] Despite an early agreement with attorney Michael Rains to allow us to interview his client, Johannes Mehserle, Mr. Rains asked that we wait until after the criminal preliminary hearing to do so. The condition of his agreeing to the interview was that we limit our questions to those concerning the other officers' conduct and not about his own conduct. We so agreed. Following the Preliminary Hearing and the Court's decision to go forward with a charge of murder against Mr. Mehserle, Mr. Rains has not returned our calls or emails to schedule his client's interview. It appears he has changed his mind.

The communications to set the interview were as follows:

3/24/09 Gilbert called Mike Rains to request an interview with Johannes Mehserle
3/25/09 Gilbert called Mike Rains to discuss scope of interview
4/08/09 Colwell called prepared letter to Mike Rains to schedule interview
4/20/09 Colwell exchanged phone messages with Mike Rains regarding scope and timing of interview
5/04/09 Colwell prepared letter to Mike Rains to schedule interview
7/07/09 Colwell discussion with Bill Rapoport regarding Mike Rains' message that interview being considered
7/16/09 Colwell letter to Mike Rains to schedule interview

Despite the inability to interview Officer Mehserle, the conclusion can be made from a close viewing of the enhanced video that he was intending to pull his firearm and not his Taser, as he can be seen trying to draw it at least two (2) times and on the final occasion can be seen looking back at his hand on the gun/holster to watch the gun come out. At the time of the shooting the video clearly depicts Oscar Grant with two hands on his back in a handcuffing position. Deadly force was not justified under the circumstances.

VIII. INVESTIGATION AND INTERVIEW TEAM

Although the BART PD began its Internal Affairs Investigation immediately following the incident on January 1, 2009 (such an investigation is traditionally performed internally), the BART management and Board shortly thereafter directed that an independent outside investigator be retained to conduct and complete the investigation. The BART management and Board are to be commended for responding proactively to the public's concern that the investigation be conducted in an unbiased, independent and objective manner.

After interviewing several consultants and teams of investigators, the Oakland-based law firm of Meyers Nave was selected to conduct the independent Internal Affairs Investigation of the six officers involved in the January 1, 2009 incident.

A contract was entered into on February 11, 2009 between Meyers Nave and BART that generally described the anticipated scope of investigation, including the complete review of the actions of the subject officers on the platform that morning and whether or not each complied with all applicable laws, rules, regulations and procedures. The specific tasks necessary to conduct this review included: (1) Reviewing and analyzing documentary evidence; (2) Interviewing relevant witnesses; (3) Reviewing and analyzing relevant policies and procedures; and (4) Generating an internal affairs investigatory report with findings, recommendations and conclusions.

The investigation team was headed by Kimberly Colwell, a partner at Meyers Nave with over 20 years experience in police misconduct litigation. Jayne Williams, Managing Principal, and former city attorney of Oakland provided overall project management. A team of attorneys and technical experts assisted with the interviews and compiling the documentary evidence and exhibits, as well as assisting with the review and analysis.[6]

Richard Webb, an executive level ranking police officer with thirty years of police experience in a large urban department, was retained to provide advice and recommendations regarding the Internal Affairs Investigation process and best police practices. His specific expertise in the review and adjudication of police uses of force, particularly deadly force, and his expertise in police internal affairs investigations were instrumental in the formulation of the findings and recommendations contained in this report. (His CV is attached as Exhibit 14.)

Dr. Timothy W. Armistead of Armistead Investigative Services was retained to assist in developing the work plan for the investigation, the review and analysis of the factual and documentary evidence and assistance in key witness interviews. Dr. Armistead, a licensed investigator, has over thirty years of experience in criminology and investigations of major police incidents. (His CV is attached as Exhibit 15.)

[6] Meyers Nave attorneys assisting with the investigation: Kimberly M. Drake, Kevin E. Gilbert, Jesse J. Lad, Camille Hamilton Pating and Samantha W. Zutler.

Gregg M. Stutchman of Stutchman Forensic Laboratory was retained to provide the forensic analysis of the video and photographic evidence. Mr. Stutchman has worked in the criminal justice system since 1973 as a police officer, a State licensed investigator and since 1992 as a forensic analyst when he established Stutchman Forensic Laboratory. As part of this investigation, a video enhancement of the video footage was done to reconstruct a comprehensive depiction of the incident and timeline (Exhibit 16).

At the commencement of this assignment, it was estimated that investigation, review and preparation of a report could be completed within approximately three months (May). However, when Meyers Nave received the initial batch of relevant files from the BART PD and began reviewing the contents, it was readily apparent that the volume of information and data that had to be analyzed was far greater than originally estimated, this also caused a commensurate enlargement of the breadth of the investigation. The number of witnesses essential to the quality and credibility of the investigation that had to be interviewed expanded substantially. The extensive documentary evidence, including voluminous recorded statements, was far in excess of the original estimate. The time and effort necessary to collate, transcribe and enhance the videos also exceeded original estimates. In addition to the review of the relevant BART PD policies and general orders, BART management requested that Meyers Nave review and comment on the policies and general orders of the BART PD relevant to this incident as to their appropriateness and compliance with current law and standards of police practice. Thus, at its meeting of March 26, 2009, the BART Board of Directors authorized the expanded scope of services for the Internal Affairs Investigation with an estimated completion date of July.

A number of external events, many of them occurring simultaneously, significantly impacted, and in some instances, actually impeded the progress of this investigation. In the early weeks of this investigation there were numerous delays in scheduling witnesses, ascertaining the availability of witnesses and negotiating with witnesses lawyers regarding the scope of their interviews and the nature of the questioning. The investigation was further complicated and hampered by the contemporaneous criminal investigations conducted by the BART PD and the Alameda County District Attorney involving the incident at the Fruitvale Station; these criminal inquiries delayed access to certain documents and statements. Former BART PD Officer Mehserle was charged with murder in the shooting of Oscar Grant. This charge resulted in a lengthy Preliminary Hearing from May 18, 2009 to June 4, 2009 during which some of the BART officers who are the subject of this investigation were called to testify, as well as other witnesses. The lawyers for the witnesses did not permit their clients to be interviewed in connection with this Internal Affairs Investigation until the conclusion of the Preliminary Hearing and until they had an opportunity to review the transcripts of their testimony at the Preliminary Hearing. A civil wrongful death lawsuit has been filed in U.S. District Court by attorney John Burris on behalf of the Estate of Grant; and the detainees have also filed civil lawsuits alleging civil rights violations arising out of the incident. Intense media coverage and public scrutiny has continued since the incident occurred. The BART Board has established a Police Department Review Committee and has retained a consultant to conduct a "top to bottom" review of all of BART PD's policies, general orders and policies for recommended best practices.

From the period February 13, 2009 to date, Meyers Nave received over 7,000 pages of documents and media from BART through Lieutenant Frank Lucarelli and Sergeant David Chlebowski of the BART Internal Affairs Department.[7] We reviewed the documents for completeness and followed up with BART to obtain additional documents, as necessary. A table summarizing the documents received and date of receipt is attached as Exhibit 17.

IX. INTERVIEWS WITH CITIZEN WITNESSES

A. P[redacted] C[redacted]

1. Background

P[redacted] C[redacted] was interviewed at her home by Kimberly Drake of Meyers Nave on May 26, 2009. She was also interviewed by BART Detective Smith on January 2, 2009. Her interview transcript is attached as Exhibit 18.

2. Impression

Ms. C[redacted] is wary of the police officers and what she perceives to be a BART bias. She feels strongly that the police who interviewed her failed to accurately report her statements. She thinks the police officers acted like "thugs." She is upset about what happened and mad that the news stories make it sound like the kids deserved it.

Ms. C[redacted] is a friendly and pleasant woman. On New Year's Eve, she was traveling with L[redacted] K[redacted] and L[redacted] C[redacted] to see a comedian perform at the Castro Theatre. Ms. C[redacted] drank no alcohol.

3. Incident

Ms. C[redacted] states that she was seated in the #2 car, 1-2 rows away from the handicap seats, next to the window. The Fruitvale platform was to her left. Her friend was sitting to her right. She states that she was sitting approximately ten (10) feet and "two minutes past 12 o'clock" from the location where Oscar Grant was shot.

She did not see any fights or altercations from San Francisco to Fruitvale. She saw a kid with dreads come through her car and 4-5 guys walk through her car. They all dressed the same – big sweatshirt and baggy pants.

[7] Throughout this investigation, BART personnel were extremely cooperative and provided invaluable assistance in the collection of the voluminous documents and records. Their assistance was greatly appreciated.

At the Fruitvale Station, she first noticed 3 kids walked over to the wall and were told to sit. The kids sat down against the wall like "good soldiers." She thinks a male officer other than Pirone walked the kids over to the wall before Pirone and Domenici arrived.

Ms. C[redacted] describes the kid furthest from her as heavier and "Mexican or black" and the kid closest to her as thinner. They are there for approximately ten (10) minutes. Oscar Grant sits with the group for approximately 3-5 minutes.

Ms. C[redacted] thinks the kids being detained were trying to talk based on their hand movements. She heard Pirone telling them, "Shut the fuck up. I don't wanna hear a fuckin' thing you have to say."

A female officer is left to watch the kids while Pirone, the "crazy cop," enters her train car screaming "Get the fuck out of my car" and "Where the fuck are you?" and "You either get the fuck out of my train or I'm gonna have to get, come in there and, and pull you out." Pirone marched through the train and said words to the effect "Now, you're making me come in here, in front of all these nice people...." Ms. C[redacted] sees Pirone grab the guy with dreads, pull him off the train, slam him against the wall, spin him around and slam him down on the ground. He was being dragged like a "rag doll." While Pirone has the guy with dreads on the ground, she sees him cuffing him.

Oscar Grant is the fourth kid to be lined up with the others. She thinks Mehserle escorted Grant from the train to the location where the other kids are lined up and has him sit down. Grant is in the middle of two detainees; he is not on either end. She sees him seated against the wall with his arm extended out and his cell phone out. Ms. C[redacted] assumes Grant is filming his friend or the police brutality. Ms. C[redacted] remembers thinking to herself or telling her friend that Grant is crazy for filming the angry cop.

When Pirone finishes handcuffing the guy with dreads, Pirone abruptly stands up and marches over to Grant and says, "You fuckin' takin' a picture of me?" She sees Grant look up at him. If Grant responded, she did not hear it. Then Pirone's back is to Ms. C[redacted] and there is an interval when she cannot see what is going on.

Next thing Ms. C[redacted] sees is Pirone taking Grant down and pinning him down with his knee between Grant's neck and shoulder (but Pirone's back is to her). Grant looked frozen and he wasn't moving. Officer Mehserle is facing her, straddling and standing over Grant. Grant is lying flat on the ground, his head toward Ms. C[redacted] Ms. C[redacted] assumes Grant's hands are underneath him because she cannot see his hands. She sees Mehserle use his right hand to tug on Grant's right elbow. Ms. C[redacted] commented to her friend, "Man, that kid must be strong because the cop can't get his hands to handcuff him."

Next thing Ms. C[redacted] sees is Officer Mehserle come up to his hip, pull a gun from his right-side, and point it. She hears a "pop." She sees what looks like gray smoke. She says, "Shit, [Mehserle] shot him." She sees Mehserle raise his hands to his head. She sees Pirone stand up, lift Grant up by his left shoulder, and then let go of him. Mehserle and Pirone start talking. No one renders medical attention.

Ms. C[redacted] sees the kid to the right of Oscar (toward the front of the train, south) react to the shooting. He looks freaked out when the gun goes off.

Ms. C[redacted] hears a lady's voice. She thinks it is the train conductor. The voice tells everybody to get inside, they're leaving.

Ms. C[redacted] was shown a picture of a Taser. She states that she never saw any weapons out until Mehserle pulled out his gun.

Ms. C[redacted] offered the following corrections to earlier statements in police report:

- Ms. C[redacted] saw Officer Mehserle shoot Grant.
- Ms. C[redacted] did not say Officer Mehserle had an expression like "Why did my gun go off."
- Ms. C[redacted] thinks she remembers the officers handcuffing Grant after he was shot.

B. M[redacted] C[redacted]

1. Background

M[redacted] C[redacted] was a witness to the incident. She took video of the incident and she gave this to the Alameda County District Attorney's office. She was interviewed by Inspectors Brock and Connor on February 23, 2009 and provided them with the memory chip from her camera. We have a copy of the report by Inspectors of the interview. Ms. C[redacted] also gave testimony at the Preliminary Hearing in the criminal case against Johannes Mehserle.

Samantha Zutler of Meyers Nave contacted Ms. C[redacted] to arrange for an interview. Ms. C[redacted] agreed to an interview on May 20, 2009. Ms. Zutler arrived at the interview location and Ms. C[redacted] did not appear for the interview. Ms. Zutler called her after the attempted interview and Ms. C[redacted] never returned her calls. Meyers Nave was not able to interview Ms. C[redacted]

C. T[redacted] C[redacted]

1. Background

T[redacted] C[redacted] was a witness to the incident. She was interviewed by BART Detective Maes on January 2, 2009 by telephone. Kimberly Drake of Meyers Nave was assigned to interview her. Ms. C[redacted] was out of town until the end of June 2009. Since that time, Ms. Drake has been telephoning her to arrange for an interview, but has not been successful in reaching her. Meyers Nave was not able to interview Ms. C[redacted]

D. Z[redacted] C[redacted]

1. Background

Z[redacted] C[redacted] was interviewed by BART Detective Maes on January 11, 2009 by telephone. He was interviewed by Samantha Zutler of Meyers Nave on May 29, 2009. His interview transcript is attached as Exhibit 19.

Z[redacted] was interviewed in a Meyers Nave conference room in our Sacramento office on May 29, 2009. He resides in Sacramento.

The only other person Mr. C[redacted] had talked to about the shooting was someone he believes was Officer Maes, who he believes was from BART PD. Mr. C[redacted] did not testify at the Preliminary Hearing, and has not talked to the press about the shooting. He has not been contacted by any other investigators.

2. Incident

On the night of the shooting, Mr. C[redacted] and his then-girlfriend (now wife) were returning from a concert at the opera house in San Francisco. They boarded BART at the Civic Center Station. That night was Mr. C[redacted] first time riding BART.

Mr. C[redacted] believes he saw the men who were pulled off the train at Fruitvale (the detainees) board at Civic Center. Mr. C[redacted] identified the six detainees as the people he saw board at Civic Center and later walk through the train.

Mr. C[redacted] and his girlfriend were sitting in the first or second car in the train, in the two seats closest to the door. The shooting occurred directly out of the window to which they were closest.

The train was not crowded when they boarded; it started to crowd around Powell Street Station, more so at Montgomery Station. The detainees walked through Mr. C[redacted] car twice. The first time he noticed them because they were being loud and talking back and forth to each other. They did not seem aggressive.

The train stopped for a long time at the Fruitvale Station. Then, Mr. C[redacted] noticed an officer (later identified as Pirone) pulling three people from another car and putting them against the wall. Pirone then starting walking up and down the train yelling, angrily, to someone in the train to get off. Mr. C[redacted] described Pirone as an "angry drill sergeant." Then the female officer (Domenici) showed up and detained the gentlemen Pirone had pulled off the train. Pirone then entered Mr. C[redacted] car and dragged G[redacted] off the car. Mr. C[redacted] said Pirone was being really aggressive, dragging G[redacted] around and forcing him against the wall. Mr. C[redacted] thought Pirone was being overly aggressive. Because Pirone was being forceful, Mr. C[redacted] could not tell if G[redacted] was resisting or not.

The detainees sat along the wall; they did not stand until after Pirone kneed Grant in the face. He doesn't remember if Domenici had a weapon drawn.

After stationing the detainees on the wall, Pirone returned to another car on the train and emerged with Grant. Pirone was also aggressive with Grant, dragging him around. It looked as if Grant might have been resisting, or telling Pirone not to shove him. Pirone pushed Grant to the wall with the other detainees. When Pirone was shoving Grant, Grant's back was to Pirone. As Grant turned around, Pirone hit Grant with Pirone's elbow. Mr. C[redacted] believes it was Pirone's right elbow. Mr. C[redacted] described the hit as aggressive and "a little over the top."

As Pirone started to walk away, the detainees were yelling, but Mr. C[redacted] couldn't hear what they were saying. He could not make out anything from Pirone directly. Mr. C[redacted] then saw Pirone turn back around and walk directly to Grant. Grant was sitting on the floor with his back against the wall. Pirone took a couple running steps and kneed Grant in the face, causing Grant's head to bounce back against the wall. At that point, Mr. C[redacted] thought the passengers on the train were going to riot. The crowd looked very aggressive and began to come off the train to stand near and yell at the officers.

After Pirone kneed Grant, the detainees stood up. Mr. C[redacted] doesn't remember if Grant stood up voluntarily or if the officers pulled him up.

Grant then made (or received) a phone call. The officers began to handcuff the other detainees. The detainees looked shocked when they stood up, and angry because Pirone was being so forceful and brutal to their friend. They didn't seem resistant, and he never saw any of them try to leave.

Mr. C[redacted] looked away from the scene and, when he looked back, Grant was on the ground. He doesn't remember where the other detainees were at that point. He doesn't remember where Grant's hands were, but thinks they might have been out to the side; they were not behind his back. Pirone was at Grant's head, with his arm on Grant, and maybe his knee on Grant's shoulder. Mehserle was not touching Grant. It looked as though the officers were having difficulty cuffing Grant.

Mr. C[redacted] heard the gun go off, but did not see Mehserle draw or reach for his gun. When he looked over, the gun was smoking and Grant was laying flat. When the actual gun went off, Mr. C[redacted] was looking at the crowd, which was yelling and getting closer to the scene. After the shot, Mr. C[redacted] saw Mehserle standing over Grant; Mehserle shook his head, had a look of utter shock, and mouthed the words "oh, my God."

Pirone then got up, shoved Mehserle away, and told him to "go, get out of here, go do something else."

At that point, the doors of the train shut, and the train exited the Station.

Mr. C[redacted] does not remember if he ever saw Grant on the far right of all of the detainees.

Mr. C[redacted] did not have any alcohol or drugs the night of shooting.

E. T[redacted] C[redacted]

1. Background

T[redacted] C[redacted] was a witness to the incident. He took video of the incident and gave his sandisk to Lieutenant Forte of BART right after the incident. This item was entered into evidence. Mr. C[redacted] was interviewed by BART Detective Carter on January 2, 2009 by telephone. He also gave testimony at the Preliminary Hearing in the criminal case against Johannes Mehserle. Camille Hamilton Pating of Meyers Nave reached him by phone on May 19, 2009. Mr. C[redacted] was not sure if he was willing to be interviewed. He said that he did not want to make this decision until after the Preliminary Hearing was complete. Ms. Pating believed that Mr. C[redacted] was amenable to the idea of her contacting him again by phone. Ms. Pating

called him three more times after the end of the Preliminary Hearing and left messages, but Mr. C never called her back to schedule an interview. Meyers Nave was not able to interview Mr. C

F. J D

1. Background

J D was a witness to the incident and took video of it. He was part of Oscar Grant's group on New Year's Eve. He provided video to the Alameda County District Attorney's office. On February 26, 2009, Detectives Enriquez and Fueng were shown Mr. Dewar's video by Inspectors Brock and Connor. BART Police did not interview Mr. D Mr. D gave testimony at the Preliminary Hearing in the criminal case against Johannes Mehserle and testified that Mr. Grant was involved in a "scuffle" with someone he knew right before the train reached the Fruitvale Station and that he assisted in ending the altercation. J D is a minor and we were unable to locate contact information for him. We did, however, learn through our detainee interviews that he could be contacted through J B We attempted to set up an interview through Mr. B but the deadline on submission of this report was too imminent.

G. K J

1. Background

K J was a witness to the incident. He was interviewed by BART Detective Power on January 7, 2009. Mr. J was interviewed on June 10, 2009 over the phone by Kimberly Drake of Meyers Nave. Mr. J is a student at UCLA and declined to meet in-person. His interview transcript is attached as Exhibit 20.

2. Impression

Mr. J grew up in Oakland. His interview belied good instincts, some street smarts, and decent observational skills. He came across as very truthful throughout his interview. He showed concern that the reporting of the BART shooting left out details about the fight he witnessed in his car, or events preceding the shooting.

3. Incident

Mr. J was at a Grateful Dead concert at the Bill Graham Auditorium on New Year's Eve. He admitted to smoking marijuana at 12 midnight. He boarded at the Civic Center Station with his friend T G He was seated in the middle of the train, in an aisle seat closest to the handicap seats, toward the front of the car (south) and opposite the BART platform. He was seated until the West Oakland Station, when he got up and got in line to off-board later at the Lake Merritt Station.

While still on the San Francisco side, Mr. J observed a group of 6-8 African American guys enter his car. He described the whole car as "rowdy" but he referred to this group of guys as "troublemakers." He described them as wearing black hooded sweatshirts. One was wearing a giant, "flashy" gold watch. Another had a grill in his teeth (he could not say whether it was gold, silver or diamonds but he found it

"hilarious"). Another had braided hair which he wore to his shoulders, like the rapper Snoop-Dogg. Mr. J[redacted] saw "the ringleader" of the group smoke a cigarette on the car; he saw a member of the group hang on the handrails; another one – the one wearing the gold watch – sat in his lap at one point.

Mr. J[redacted] was an eyewitness to the shoving match on the BART car after the West Oakland Station and before the Fruitvale Station.

Mr. J[redacted] was standing in line to off-board. He described the line as follows:

- Unidentified male closest to the doors;
- An African American male in his 20's-30's, of average build, with a bald or shaved head;
- Mr. J[redacted] and his friend T[redacted] G[redacted]
- A young couple in their 20's or 30's, specifically, a "gorgeous blonde girl" with her stocky boyfriend, who had brown hair and wore a Marine-like crew-cut; and
- The 6-8 African American guys whom Mr. J[redacted] refers to as "the troublemakers."

Mr. J[redacted] hears "the ringleader" shout, "Push to the front...come on." Mr. J[redacted] sees the ringleader push the blonde girl. Her boyfriend turns around and says, "Hey man, like watch it." The ringleader says: "What'd you say to me?" There is no response. The ringleader pushes the boyfriend. The boyfriend looks like he may fight back. The ringleader says, exact quote: "You really don't know how many of us niggas there are back here." Then he turns around and he counts all his friends, "One, two, three, four, five, six, seven...oh, you fucked now."

According to Mr. J[redacted] friend Mr. G[redacted] the ringleader also said, "You gonna get your [throat slit]." Mr. J[redacted] did not hear this part. Chaos ensues. The blonde girl is punched. Her boyfriend is beat up by the ringleader and two other guys. Mr. J[redacted] and his friend cannot wait to get off the train. They off-board at the Lake Merritt Station. Mr. J[redacted] does not see any BART Police officers but he hears someone mention that BART Police have been called, or words to that effect.

H. L[redacted] K[redacted]

1. Background

L[redacted] K[redacted] was a witness to the incident. She was interviewed by BART Detective Power on January 3 and 5, 2009. L[redacted] K[redacted] was interviewed on June 9, 2009 by Kimberly Drake of Meyers Nave. Her interview transcript is attached as Exhibit 21.

2. Impression

Ms. K[redacted] declined to be interviewed in-person. She is a reluctant witness and is trying to "forget it all." She is easily flustered and perturbed. Her powers of observation are excellent and we did not find any contradiction in her interviews.

3. Incident

On New Year's Eve, Ms. K[redacted]vent to see a comedian at the Castro Theatre in San Francisco with three friends. She had one beer at a Japanese restaurant in Hayward before taking BART from Hayward to San Francisco.

After the show, Ms. K[redacted] returned home. She boarded at Powell Street Station. She and her friends were not in the first car or the last car. She guesses they were in the #2 or # 3 car. It was very crowded. She was standing.

Ms. K[redacted]did not see any fights or altercations on the train. While she was standing, somewhere between Powell and West Oakland, a group of young guys (maybe 3) walked through her car from the car behind her (south toward the front) and 2 returned and walked back into her car. They were loud but they were not harassing anyone. One of the guys had short dreadlocks. He was pulled off her car. There were a couple other guys that had shorter hair. One was black and the other looked Puerto Rican. They definitely were not short.

This group made some loud comments about a guy with a burrito, like "that smells good."

By West Oakland, the car opened up more and Ms. K[redacted]found a seat in the aisle, 3-4 rows back from the rear (northernmost) door of the car. She was seated backwards facing the rear of the train, next to the guy with the burrito and across from her friends. At the Fruitvale Station, she was seated on the opposite side of the platform.

4. Fruitvale Station

When the doors opened up at Fruitvale, Ms. K[redacted]heard some yelling on the platform. At that point, she saw two officers, one male (white, 6'3", light-colored hair, buzz cut) and one female (dark hair and shorter). The male officer was yelling but she couldn't hear what he was yelling. The male officer came up to the door closest to Ms. K[redacted]and started yelling at someone on the train. He came onto the car and started yelling "Get the fuck off my train." Ms. K[redacted]stood up to see what was going on. The male officer kept screaming "Get the fuck off my car," and "I asked you nicely, now I'm gonna pull you off," and "I'm gonna remove you myself." The male officer went to the back door of the car and pulled the guy with short dreadlocks off Ms. K[redacted]car. He slammed the guy against the concrete wall. Ms. K[redacted] says the officer was pretty crazy – "I've never seen anything like it." Ms. K[redacted]saw 2-3 other guys off-board the car to her north.

After the police officer slammed the guy against the wall, he threw him down on the ground. While the guy was laying on the ground, he tried to take his cell phone out like he was trying to take pictures. The officer took his cell phone.

There was a lot of commotion, a lot of screaming and yelling.

The male officer got at least 3 other guys off the train and in custody (1-2 might have been black; one might have been dark Hispanic). Ms. K saw them sitting against the wall on her left, opposite the doors. Ms. K never noticed Oscar Grant seated in the southernmost position. She remembers the male officer going back and forth between the guy laying down and the guys sitting against the wall. When the male officer got near the guys sitting against the wall, they would throw their hands up. The male cop was like a drill sergeant in the military screaming and yelling in the detainees' faces. It was like he was putting on a show. The detainees were not doing anything other than sitting there with their hands up. They looked more scared than threatening.

The female officer was not doing much. She looked more scared than anything else. Ms. K does not recall seeing her with her Taser.

After quite a few minutes, other officers showed up. Although Ms. K cannot describe them, she states that two male officers were not letting anybody off the train. They were holding people back. They were screaming at people to put their cameras down. They did not want anyone taking videos or pictures of what was happening. They tried to take away the cameras of two guys (one black; one white) who were standing in Ms. K car taking pictures. Ms. K also recalls Pirone trying to get the cameras away from the guys on the ground.

Ms. K saw the male officer with his knee in Oscar Grant's neck. At the time, Grant was laying on the ground, face down, with both arms underneath him. There was another officer (white, tall 6'3" to 6'4" with short dark hair) trying to pull Oscar Grant's arms out from underneath him.

Ms. K did not see the shooting because she sat back down in her seat while Grant was lying on his stomach. When she sat down she heard the pop. Then she stood back up. When she stood back up, she saw Mehserle put his hands up to his head and what she describes as his "shocked reaction."

I. C L

1. Background

C L was a witness to the incident. She was interviewed by BART Detective Carter on January 10, 2009. She was interviewed by Camille Hamilton Pating of Meyers Nave on May 26, 2009. Her interview transcript is attached as Exhibit 22.

With respect to visual perspective, L had an excellent view of the incident – she was standing in the second car doorway of the BART train, about 10-20 feet away from the detainees and officers. She had a detailed recollection of the incident. Ms. L observed the following sequence of events, described below:

- Verbal confrontation between groups of Latino and African American youths;
- Two members of African American group enter Ms. L train car. One was forcefully removed by Officer Pirone and thrown against the wall;
- Officer Pirone's "very agitated" behavior on the platform;

- Detainees' resistant behavior – talking back and refusing to follow Officer Domenici's instruction to sit down – while against the wall;
- Officer Pirone pointing at detainees who were "going to jail" then kneeing Oscar Grant;
- Oscar Grant's arms behind his back before he was shot; and
- "Shocked" reaction of Officer Mehserle after the shooting.

Ms. L[redacted] agreed to be contacted again should additional information be needed for this investigation.

Ms. L[redacted] resides in Castro Valley. She is married to M[redacted] T[redacted] also a witness to the incident whose statement has been taken separately. She has previously given one statement to BART Police (TR. pp. 1-2).

2. Impression

C[redacted] L[redacted] presented as a credible witness. Her demeanor was straightforward, cooperative and did not appear to be biased toward any party.

3. Incident

On December 31, 2008, Ms. L[redacted] and her husband traveled via BART from their home in Castro Valley to meet a group of friends for dinner in San Francisco. They disembarked at Embarcadero Station and walked to meet their party of ten, and had dinner at about 8:00 p.m. Ms. L[redacted] did not consume any alcohol that evening. At about 1:00 a.m., they walked back to the Embarcadero BART Station with another couple to return home to Castro Valley. (TR. pp. 2-3.)

Ms. L[redacted] stated they boarded the train onto the second train car of the Dublin-Pleasanton train. Ms. L[redacted] identified her exact location by marking the schematic and photograph of the inside of a BART car, which are attached as Exhibits (TR. p. 4).

The train car was "definitely packed," with the occupants standing shoulder to shoulder, and Ms. L[redacted] group of four was standing "right at the doors." She did not notice any arguments among passengers until they arrived at Fruitvale Station (TR. p. 5).

4. Fruitvale Station

When the train stopped, Ms. L[redacted] observed "in the first train car, a group of...Latinos were yelling at people...that appeared to have been still on the BART train. ...It looked like [they were yelling] into the car train." [sic] This group consisted of two women and the rest male, possibly seven persons in all. They were young, "no more than 25" (TR. pp. 5, 6, 7). After about 10 or 20 seconds, the Latino group stopped yelling and started walking away to the north, down the platform to exit the Station. She then saw a group of African Americans get off the train and start walking, and two persons from this group entered her train car while the rest walked (TR. pp. 5, 7). The African American group consisted of five to six persons, about the same age as the Latino group. One of the persons who entered her car wore jeans and a white T-shirt. The other wore a red and white hat (TR. p. 8).

An officer arrived who "looked like a typical Army,...military guy with the crew cut hair and ...stocky and tall." The "crew cut" officer pulled over the African Americans who were walking north down the platform and then started yelling at the train car behind Ms. L[redacted] The officer then approached Ms. L[redacted] car. "When he came to our car he was pointing...what I now know was a Taser...he was just cussing and very pissed off" (TR. pp. 9, 12). A female officer arrived at this point. She told the detainees against the wall to sit down. They complied but then stood back up. The female officer "was telling them to sit down, sit down, and they were giving the officer lip." Ms. L[redacted] heard the woman officer saying "you still better respect me" and "I'm still an officer" while the detainees were "talking back" to her (TR. p. 9).

Ms. L[redacted] heard the detainees say, "Well what's going on? What's this all about?" and "We didn't do anything" (TR. p. 14). They were talking to the woman officer, "saying something and like very angry, and then they would sit down, and then they'd stand up" (TR. pp. 15, 16). The person who was forcefully removed by Officer Pirone and thrown against a wall, who Ms. L[redacted] believes was Oscar Grant, was one of the detainees who "stood up and wouldn't sit down again when the officers told them to all sit down" (TR. p. 17). Ms. L[redacted] did not observe the detainees use any physical force against the officers.

The "crew cut" officer was "very agitated" on the platform looking for the persons who had entered Ms. L[redacted] train car. He was saying "Motherfucker, get off the train. Don't think I don't see you. Get off the train; otherwise I'm gonna get on that fucking train." Ms. L[redacted] stated that the officer "just kept throwing the f-word and that's what I kept noticing." He was telling the people on her train, "Get off. I saw you. Don't think I'm stupid. Get off the train." This was stated multiple times (TR. pp. 9, 12).

The persons did not get off and the officer "was pissed off and he pulled one guy off and threw him against this wall,...with the other people that were pulled over." The person who was taken off in this manner was African American with a short natural hairstyle. He wore baggy jeans and a large white T-shirt. Ms. L[redacted] believes this detainee was Oscar Grant, although she was not certain. The officer removed him from the train in a "pretty aggressive" manner, holding the scruff of the neck of the detainee's T-shirt in his fist and pushing at the detainee's back with his forearm. The officer twisted the detainee as he was thrown against the wall so the detainee's side and back struck the wall as he landed (TR. pp. 9-10, 12, 17-18).

Ms. L[redacted] saw another person from the African American group who had entered the third car get off voluntarily. That person was placed against the wall. Ms. L[redacted] did not see who detained the person (TR. pp. 12-13).

At that point, Ms. L[redacted] noticed another detainee who was "not Oscar Grant" lying on the ground. She marked the schematic to show the position of the detainee on the ground south of the group against the wall. Ms. L[redacted] did not see this person taken down or handcuffed (TR. p. 11).

The "crew cut" officer walked on the platform from south to north. He pointed to the first detainee that was standing against the wall and said, "This guy's going to jail (or getting arrested)." The officer pointed at "the second or third" detainee as he repeated the statement (TR. p. 20). Then Ms. L[redacted] saw the "crew cut guy" come up to Oscar Grant and "knee" him. Grant hunched over and was pushed to the ground, with the crew cut officer on top of him. Ms. L[redacted] saw the officer's knee on Grant's body, at the upper back or neck. The crew cut officer's back was turned to L[redacted] and Officer Mehserle was facing her (TR. pp. 11, 14, 21). She saw Oscar Grant's arms behind his back – "his hands were definitely back." She did not see his palms up,

but demonstrated how his shoulders were arched with his arms behind his back (TR. pp. 20-21). After Grant was "kneed" and taken down, L heard the detainees say "Why –why are you doing that?" and "He didn't do anything" (TR. pp. 21-22). Other than the crew cut officer, Ms. L did not see any BART Police officers use physical force against the detainees.

Ms. L then heard what she now knows was a gunshot. She saw Officer Mehserle standing above Oscar Grant. His facial expression "was like, "'Oh my God – what just happened?'" Mehserle's expression was "basically shock." She did not hear anything he said. Ms. L observed Oscar Grant lifting his face in pain, and saw blood on the platform (TR. pp. 11, 22). The BART train doors then closed and the train took off (TR. p. 23).

J. D

1. Background

D L was a witness to the incident and took video. He gave this video to Alameda County District Attorney's office Inspectors Brock and Connor on February 23, 2009 during an interview. We have a copy of the report by Inspectors of the interview. He also gave a copy of the video to a news channel in exchange for money. Mr. L gave testimony at the Preliminary Hearing in the criminal case against Johannes Mehserle. We were unable to locate a phone number for Mr. L only an address. Thus we were unable to interview him.

K. R M

1. Background

R M was a witness to the incident. He was interviewed by BART Detective Smith on January 1, 2009 by telephone. Camille Hamilton Pating of Meyers Nave set an interview with him on May 18th. Before the date of the scheduled meeting, Ms. Pating called him to reschedule or reset the place of the meeting and left messages for Mr. M She did not hear back from him. She continued to place more calls to him and left messages for him and never received a call back. Meyers Nave was unable to interview Mr. M

L. B C

1. Background

B C was a witness to the incident. He was interviewed by BART Detective McNack on January 2, 2009 by telephone. He was interviewed by Camille Hamilton Pating of Meyers Nave in person on May 20, 2009. His interview transcript is attached as Exhibit 23.

2. Impression

B O presented as a credible witness in some aspects of his statement – specifically his vivid account of a second altercation in another train car unrelated to the conflict between Latino and African

American youths. However, Mr. O[redacted] placement of himself in the second[8] train car, description of detainees being 'Tased' and 'zip-tied,' misidentification of photographs of M[redacted] G[redacted] and Officer Knudson, and other opinions he developed about the case, impressed the interviewer as not reliable. His demeanor was cooperative, but appeared biased against the police. In addition, Mr. O[redacted] seems to relish his notoriety as a witness in this matter, has developed his own theories about how and why the incident could have occurred and has altered his testimony from his initial interview. He indicated that he has watched videos of the incident and discussed it with others whose views have influenced his current perspective as well. The interviewer also believes that alcohol affected Mr. O[redacted] ability to perceive – he was drinking vodka shots before the incident. Mr. O[redacted] reported the following sequence of events, described below:

- Physical fight between African American youths and a White couple;
- Officers met the train at Fruitvale and pulled the detainees out of the first train car; used Tasers to subdue detainees;
- Take down and shooting of Oscar Grant;
- Detainees "screaming at the officers" as they were lined up on the wall;

Mr. O[redacted] resides in Tracy. He has previously given one statement to BART Police; he also contacted Channel 5 News and was interviewed by a reporter (TR. p. 2).

3. Incident

On December 31, 2008, Mr. O[redacted] his girlfriend and two friends went to another friend's apartment near Coit Tower in San Francisco to celebrate New Year's Eve. They left from his father's home in Castro Valley, at about noon, and took the BART to San Francisco, arriving at about 1:00 p.m. They stayed in San Francisco the entire day at his friend's home having a BBQ and a New Year's party. Mr. O[redacted] was drinking vodka shots, and estimates he had "four or five shots through the whole day, you know what I mean?" His last shot was ten minutes before midnight (TR. pp. 2-3).

They boarded the Dublin/Pleasanton train at Embarcadero Station for the return trip to Castro Valley.

Mr. O[redacted] stated, and indicated on the schematic (attached as an Exhibit), that he boarded onto the second BART train car (TR. p. 4). He stated that there was a physical fight on his car involving seven African American males, approximately 17 or 18 years old, and a white male and female. One member of the African American group was trying to get off as the train approached West Oakland Station. Mr. O[redacted] stated the youth told "a guy standing up in the middle [aisle]...'Go'. And, the guy was just like, 'No. I'm not gonna go.' His girlfriend's in front of him...." The African American youth then pushed the other man and "punches were thrown." When the other members of the group saw the fight between their friend

[8] It appears that Mr. O[redacted] might have been in the third or fourth car based on his description of being "50 to 100 feet away" from the events and of seeing detainees pulled from the car in front of him, as well as his description (TR. p. 12).

and the much larger man, they jumped into the fray. In the middle aisle, all seven of the youths were punching the man and his girlfriend (TR. p. 5). People were jumping over seats and passenger's heads trying to throw punches on the packed train. The woman was grabbed by the hair and was screaming. The fight lasted 30 seconds to one minute (TR. p. 9). When the train stopped, the man and woman got off, but the seven youths remained on the train (TR. pp. 5-6). After exiting the train, the man stood on the West Oakland platform, took off his shirt and threw his hands up. The woman was crying (TR. p. 7).

Mr. O[redacted] described the white man involved as about 20-25 years old, approximately 200 lbs, wearing a white basketball jersey (TR. pp. 6, 7). The "girlfriend" had a blonde ponytail hairstyle.

Mr. O[redacted] stated that, when the train pulled up to Fruitvale Station, the next stop after West Oakland, one or two officers were already there, and began "pulling people out of the front train." The youths involved in the fight in Mr. O[redacted] car "are sitting quietly, like nothing happened" (TR. pp. 7, 10).

Mr. O[redacted] expected that the officers were there to arrest the youths involved in the fight on his car, but that did not occur. "Everything was in the first train" (TR. p. 19).

As two detainees were pulled from the train, "they looked confused," and were put against the wall. The police told them "stay down, stay down." Two more detainees were then brought out from the first car with their hands up, saying, "What are we doing?" (TR. p. 7).

Mr. O[redacted] stated that one detainee started to walk away from an officer. The police officer pulled out his Taser, hit him in the back with the Taser. "He goes down" (TR. p. 7). A second detainee is "scared" and "takes off, too." The second detainee was Tasered. Two other detainees were at the wall watching. They stood up and another officer "comes and puts them to the ground" (TR. p. 7). All four detainees were "zip-tied" and seated at the wall (TR. pp. 8, 10). The two detainees who were "Tasered" were white or Mexican, not African American (TR. p. 17). They were asking the officers "What did we do?" but were "moved around" and "thrown down" by the officers (TR. p. 18). Mr. O[redacted] stated that the actions of the officers was "unnecessary to the fullest. I'd say this is brutality to me, you know what I mean?" (TR. p. 8). Mr. O[redacted] stated that one officer, the first officer on the scene, "put out a vibe" of brutality by "bringing a guy to the ground that's not really trying to resist or do anything" (TR. p. 20). Other officers were "throwing" detainees on the ground (TR. p. 19, 20).

At this point, Mr. O[redacted] stated, Oscar Grant and two other detainees were removed from the first train car. However, Mr. Ozenne noted that "Oscar has like 12 people in that car who are his friends because they didn't detain 'em all, so they're all circling around, ...and making the officers kinda jumpy, you know what I mean?" (TR. p. 8). Mr. O[redacted] stated that more officers arrived and "tackled those guys. They had their billy clubs out....it was unnecessary. ..They were all being pulled out of the train" (TR. p. 8).

Mr. O[redacted] did not observe any of the officers punch or kick any detainees, but felt the detainees were held inappropriately (TR. p. 27).

Mr. O[redacted] stated that he saw Grant exit the train car, walk about 10 feet, and taken down immediately by three officers, one "hanging over him, one officer on his front, one office on his back" (TR. p. 23). An officer had a knee in Grant's back. He was the same officer who was the "first guy on the scene." Grant was face down for "a good few minutes before anything happened and was screaming, 'What? Why am I here?'" (TR. p. 24). Mr. O[redacted] believed Grant was "zip tied" at this time, but did not see him being handcuffed. Mr. O[redacted] heard the shot and heard the first officer say, "take the handcuffs off him right now" to Mehserle (TR. pp. 25, 27).

After Grant was taken down, Mr. O[redacted] heard the detainees "screaming" on the wall. "They were just yellin at, you know the officers that are holding down Oscar..., 'he's down, he's down, he's down. Leave him alone. He's down'" (TR. p. 24).

Up until that point, the detainees mostly looked confused against the wall. Mr. O[redacted] did not observe any detainee attempting to hit or assault an officer (TR. pp. 26-27).

Mr. O[redacted] reported that he was standing in an open doorway of his train car and filmed the incident on his cell phone. His video was given to BART Police (TR. p. 11).

Mr. O[redacted] identified a photo of M[redacted] G[redacted] as a bystander at the scene wearing a "puff jacket" who was yelling at police to let Grant go, and was later apprehended himself (TR. pp. 13, 14, see Exhibits). Mr. O[redacted] stated that one officer who he identified as the "first guy" on the scene was unnecessarily "brutal" with the detainees. He identified a photograph of Officer Knudson as that officer (TR. p. 19, see Exhibits). He correctly identified Officer Mehserle's by his photograph attached as an Exhibit.

Mr. O[redacted] did not observe the shooting. He stated that he observed Oakland police officers at the scene patting the detainees down at the wall. He could tell they were OPD officers by their identification on their arms (TR. p. 29).

M. A[redacted] R[redacted]

1. Background

A[redacted] R[redacted] was a witness to the incident. She was interviewed by BART Detective Maes on January 2, 2009 by telephone. Ms. A[redacted] had spoken with Tom Leary, an investigator for Mike Rains. She also spoke with Detective Maes from BART Police, and testified at the Preliminary Hearing. She had not spoken to the press, and no one else had tried to interview her. Samantha Zutler of Meyers Nave interviewed Alika Rogers on June 4, 2009, in a conference room of the Meyers Nave offices in Sacramento. Her interview transcript is attached as Exhibit 24.

Ms. A[redacted] resides in Sacramento.

2. Incident

On the night of the shooting, Ms. A[redacted] was traveling with her then-boyfriend (now husband) Z[redacted] C[redacted] from San Francisco to Dublin. They boarded BART at the Civic Center Station at about 12:45 a.m. Ms. A[redacted] had not been drinking, or taken any drugs. When they boarded, the train was not crowded, but it was full after about three or four more stops.

Ms. A[redacted] was on the second car near the front, near the door and next to the window. When the train moved, she was traveling backwards.

Ms. A[redacted] does not remember whether the detainees boarded the train at Civic Center. She saw them for the first time, she thinks, between Powell and Embarcadero, when a few of them walked through her train car. They were talking to a woman behind Ms. A[redacted] complaining about the smell of the woman's burrito. Ms. A[redacted] identified the gentlemen who walked through her train as J[redacted] B[redacted] G[redacted] and Grant.

3. Fruitvale Station

When they arrived at the Fruitvale Station, the doors opened and Ms. A[redacted] heard someone shouting. She later identified the man as Pirone, who was shouting at someone to "get off this fucking train." She described him as angry and stern. She wondered if he realized how many people were watching him.

Pirone entered the train via the door near Ms. A[redacted] He then went left, towards the rear of the train, and returned with some of the detainees, who he put on the platform. The detainees were mouthing off, but were not physically resisting. She believes the officers were having difficulty getting the detainees to line up against the wall. Pirone's demeanor was aggressive and angry. The detainees were being difficult and talking back to the cops, but were not physically resisting.

Ms. A[redacted] memory of Pirone pulling Grant and G[redacted] off of the car is not clear. At some point, though, she knows all five detainees were sitting against the wall. She saw Grant pull what she assumed was a cell phone out of his pocket.

She recalls Pirone punching someone, but does not recall if it was Grant or G[redacted] Pirone was facing the other, and leaned in and threw either a fist or elbow, and the detainee's head went back. Ms. A[redacted] was shocked. She did not hear the detainees make any threats, but did hear him be verbally resistant, saying the whole thing was bullshit, that they didn't do anything, and that it was police brutality. They did not threaten the officers. After Pirone punched the detainee, Ms. A[redacted] worried the crowd on the train would riot. People started to exit all of the cars in the train.

Ms. A[redacted] first memory of the detainees outside of the train is seeing them sitting; she does not recall how they got there. Grant was in the middle. The officers were standing in front of the detainees. She doesn't actually remember Grant standing up (she saw it in the video in court), but remembers immediately after that Pirone turn around and grabbed Grant's head and "shoved [Grant's] face right into [Pirone's] knee." Pirone kneed Grant with his left leg, as he was standing over Grant. Grant's head went back and hit the wall behind him.

A couple seconds later, Pirone grabbed Grant and threw him on the ground, and kneeled down on Grant's neck or shoulder. Mehserle was on the opposite side of Grant. Grant was struggling, not giving up his hands; she thought he had something in his hands (maybe a cell phone). Mehserle and Pirone struggled to get Grant handcuffed. Grant's hands were out, not on top of his back behind him; he was not handcuffed. She then saw Mehserle aiming his weapon at Grant, who was facedown on the ground, hearing a pop, and seeing smoke coming from Mehserle's firearm. She did not see Mehserle reach for his weapon.

Ms. A[redacted] first thought was that Mehserle could have shot Pirone. Mehserle then holstered his weapon and threw his hands up to his face and said "Oh my God, oh my God." Pirone then told Mehserle to get out of there. She does not think she saw Mehserle talk to Pirone after the shooting. The train doors then closed and the train left the Station.

Ms. A[redacted] described Domenici as calmer than the rest, and professional; she never got rough or loud throughout the entire event. Pirone, she said, "was not calm, not once." She stated that she was surprised that Pirone was not on trial, and that she does not think he should still be a police officer. She felt that, if he had not been there, events would have happened differently, as he "got everyone fired up." She described Mehserle as "the rookie" and said he looked scared the whole time, uncomfortable, and "not quite sure what to do." She believes the shooting looked like an accident.

N. M[redacted] A. S[redacted]

1. Background

M[redacted] A. S[redacted] was a witness to the incident. He was interviewed by BART Detective Power on January 6, 2009. He was interviewed on May 18, 2009 by Kimberly Drake of Meyers Nave. His interview transcript is attached as Exhibit 25.

2. Impression

Mr. S[redacted] comes off as a pleasant person. He has a pro-police bent. He has a very laid back demeanor, however. He interrupted a lot. His answers to questions were at times meandering and confusing. His powers of observation seemed off at times. I think he may be conflating what he has watched on the news with his actual observations (i.e., M[redacted] talks about a fight on the train between Lake Merritt and Fruitvale but he did not see or hear the fight).

3. Incident

Mr. S[redacted] was reportedly completely sober at all material times. He called his BART car the party train full of drunk people making dumb or stupid comments.

Mr. S[redacted] was seated in the # 3 train car from the front until he off-boarded. On a diagram of the platform, he marked where he was seated and where the shooting occurred in relation to that location. Although he did not witness the shooting, he heard the shot and saw "a man down and mass confusion."

4. Fruitvale Station

When the train first arrived at the Fruitvale Station, Mr. S[redacted] first saw a female officer (Domenici) and a Hispanic male officer with a buzz cut (Pirone). They had at least two guys in custody, one of whom was Oscar Grant, and they were sitting them down against the wall. Pirone was giving instructions to some people to the northeast of Mr. S[redacted] with a very authoritative voice. Mr. S[redacted] could not remember what Pirone was saying but thinks it was words to the effect "shut up and sit down."

According to Mr. S[redacted] an African American having small or short dreads [whom Mr. S[redacted] says is the guy who got shot, Grant] ran from custody back inside the BART train (# 2 car). Mr. S[redacted] saw Pirone get extremely mad and start screaming at [Grant], leaving the female officer to fend off the other people. Pirone followed [Grant] into the #2 car and into the #3 car. Pirone screamed "get the F off the train now...." Pirone grabbed [Grant] and they exited through the doors of the #3 car. Pirone brings [Grant] back to the same spot (where another guy is sitting down and where Grant is eventually shot).

Pirone reportedly screamed at [Grant] "Sit down, sit down." As Mr. S[redacted] describes it, Pirone was trying to embarrass [Grant] in front of an audience. Grant would not sit down. Mr. S[redacted] states you could tell [Grant] was "mouthin' off" to Pirone or said something that enraged Pirone because Pirone then "dropped him." Mr. S[redacted] states Pirone kicked [Grant's] legs out [from under him] and slammed him to the ground, face down, and put his knee in [Grant's] back. When asked for further description, Mr. S[redacted] said Pirone grabbed [Grant] by his left shoulder, used his right leg to kick his feet out and pulled his shoulders down to the ground in one motion. It did not look like it felt good. Then Pirone slammed him really hard to the ground and got on him and placed his right knee on his back. Mr. S[redacted] further clarified that Grant had one hand behind his back for a split second, as if the BART Police had started to cuff him. However, Mr. S[redacted] did not see cuffs go on.

This encounter reportedly got everyone's attention in the train and everything snowballed and escalated from there. This is the around the same time the female officer looked like a "deer caught in the headlights."

After Pirone brought [Grant] to the ground, he was trying to handcuff him. While Grant was face down, his head was facing toward the concrete wall (away from this witness). Mr. S[redacted] says Grant had one hand behind his back but could not say which one or for how long. Mr. S[redacted] noticed a heavy-set white police officer join Pirone. It looked like he was trying to help Pirone cuff [Grant]. Mr. S[redacted] stopped paying attention at this point because he thought everything was under control.

Mr. S[redacted] turned his attention to 4 male bystanders who were congregating in front of the bench where an Asian couple was sitting.[9] These guys started trying to swarm or engage or distract the officers from a safe distance and out of range of the Taser. Mr. S[redacted] thinks these bystanders were trying to free their

[9] Mr. S[redacted] stated that a well-dressed Asian couple, late 30's/early 40's, was sitting on a bench inside the Fruitvale station, close to the detainees, and remained there, stone-faced, through the shooting.

buddies. They went nuts when Pirone "dropped" Grant. They started going into their jacket pockets and grabbing what turned out to be cell phones. They knew they had an audience and they were hamming it up. They were yelling stuff at the police officers and the police officers were yelling stuff back at them. Then Mr. S heard a shot fired. Mr. S thought it was a Taser. Mr. S did not see the shooting. But, the officers in his vision had expressions like "Oh, crap," and "What the hell?"

After the shooting, Mr. S saw one of these bystanders, a black guy or Filipino male with short hair, really tall, approximately 6' tall, throw a cell phone he was using to record in the direction of the police officers who were dealing with Oscar Grant.

Domenici reportedly had her Taser drawn from the moment the train arrived at the Fruitvale Station and was using it for crowd control. Mr. S saw her point her Taser at the detainees against the wall. He also saw Pirone point his Taser at the detainees. Mr. S describes Domenici as nervous and Pirone as "a ball of anger."

Mr. S describes an African American guy in custody with long hair and a ponytail [N B . Mr. S saw Mr. B on BART earlier in the evening. Mr. B was traveling with a bunch of people in Mr. S car (# 3) and the car south of him (# 2). Mr. B appeared to be linked with at least two people. First, there was a light-skinned black guy, thin, approximately 6' tall, with interesting short, curly hair who was making "smart comments" about someone stinking on the train car # 2. He said words to the effect of: "Oh, man, the motherfucker stinks in there..." and said it loud enough to where whoever he was talking about heard him. Mr. S calls this guy an "asshole." Mr. S states this guy got away and left the BART Station before the shooting. The second guy linked with N is a shorter guy, medium build, about 5'6" or 5'7," may be Filipino or Hispanic, with long black hair in a ponytail.

After Mr. B was taken into custody, Mr. S saw Mr. B combing his hair and sitting down on the platform with his back to the wall. Mr. S calls Mr. B the barometer – his facial expressions went from playing it cool to looking nervous and/or fearful. After the shot was fired, this guy looked like he was having or had "a bowel movement."

As the train pulled out of the Fruitvale Station, Mr. S claims he saw a police officer come up on an escalator and tackle one of the 4 bystanders from behind.

O. J S

1. Background

J S was a witness to the incident. Mr. G testified that Mr. S was with their group that night and may have videotaped the incident. However, N B stated that J D was with them that night and not J S Both men are described as being the same age and took videotape of the incident. BART Detectives Enriquez and Fueng went to Mr. S known residence on January 28, 2009 and they also called him. He was not at home and they left a business card. He never called Detectives Enriquez or Fueng. Samantha Zutler of Meyers Nave called the telephone number listed for Mr. S and spoke with a woman who identified herself as M G mother. Mrs. G stated that

her son was injured and that Mr. S[redacted] was not on the incident train but J[redacted] D[redacted] was. She thought Mr. D[redacted] had video but would not give us his information. We were unable to locate him.

P. M[redacted] T[redacted]

1. Background

M[redacted] T[redacted] was a witness to the incident. He was traveling on New Year's Eve with his wife, C[redacted] L[redacted] He was interviewed by BART Detective Carter on January 3 and 10, 2009. He was also interviewed on January 12, 2009 by Alameda County District Attorney's office Inspector Frank Moschetti. He was interviewed by Camille Hamilton Pating of Meyers Nave on June 23, 2009. His interview transcript is attached as Exhibit 26.

2. Impression

Mr. T[redacted] is a 31-year old project manager for a San Francisco advertising firm, [redacted] Mr. T[redacted] presented to this interviewer as an intelligent, articulate witness. His demeanor was straightforward, cooperative and did not appear to be biased toward any party. Mr. T[redacted] comes across as interested in an accurate recounting of the incident – he came forward as a witness after watching early media reports suggesting that the shooting was racially motivated, which he believed was untrue. Mr. T[redacted] had an excellent visual perspective – he was standing in the second car doorway of the BART train, about 10-15 feet away from the detainees and officers. He has a detailed recollection of the incident. Mr. T[redacted] observed the following sequence of events, described below:

- Confrontation on the platform between groups of Latino and African American youths;
- Detainment of members of the African American group, including three men – Oscar Grant among them - who entered Mr. T[redacted] BART car;
- Officer Pirone's "harsh and unprofessional" behavior on the platform, including searching for detainees on the train and removing a detainee from the second car;
- Detainee J. B[redacted] insulting and resistant behavior toward officers while against the wall;
- Officer Pirone saying, "That motherfucker's going to jail," indicating Grant, then kneeing Grant in the stomach; and
- "Shocked" reaction of Officer Mehserle after the shooting.

Mr. T[redacted] agreed to be contacted again should additional information be needed for this investigation.

Mr. T[redacted] resides in Castro Valley. He is married to C[redacted] L[redacted] also a witness to the incident whose statement has been taken separately. He has previously given two statements to BART Police, the District Attorney of Alameda County, and a local news station. Mr. T[redacted] came forward as a witness after watching a media report which portrayed the shooting as racially motivated, which he felt was inaccurate (TR. p. 2).

3. Incident

On December 31, 2008, at approximately 7:30 p.m., Mr. T[redacted] and his wife traveled via BART from Castro Valley to a friend's home near Pac Bell Park in San Francisco. They spent the evening playing video games and watching fireworks on the Embarcadero. He had "a few drinks" at his friend's home over a four hour period but did not feel his perceptions were affected. At approximately 1:45 a.m. the evening ended and he, his wife and two friends walked back to the Embarcadero Station to catch the Dublin–Pleasanton train to return home. Mr. T[redacted] stated they boarded the train onto the second train car – initially he said he was on the third or fourth car but corrected himself after looking at the schematic. Mr. T[redacted] identified his exact location by marking the schematic and photograph of the inside of a BART car, which are attached as Exhibits (TR. pp. 3-7).

The train was crowded, and Mr. T[redacted] group of four was standing in the doorway. The ride from San Francisco was uneventful, and he did not notice any arguments among passengers, until they arrived at Fruitvale Station (TR. pp. 8-9).

4. Fruitvale Station

The train stopped when it arrived at Fruitvale Station. Mr. T[redacted] observed "something going on," in the car in front of him, and a group of people left that car and went out onto the platform. On the platform, there was "a continued verbal argument" and two groups, one Latino and the other African American, were confronting each other. Mr. T[redacted] estimated eight to 12 people combined in the two groups. The Latino group had one or two women in it. One member wore "a very large white or light t-shirt." There was no physical confrontation, but "people standing up to each other." The groups were facing one another and yelling. The face-off lasted "several minutes" on the platform, until the BART Police showed up (TR. pp. 10, 11, 12).

When an officer Mr. T[redacted] described as having a "shaved head and kind of a crew cut on top" appeared, the Latino group dispersed ahead of the African American group. The African American group then started to walk down the platform as well, and three members of the group ducked in to Mr. T[redacted] train car. "People were diving into cars to avoid the whole thing." These included Oscar Grant, a man with a red baseball cap who was taller than the other two and a third man. One of the three, who Mr. T[redacted] believes was the "red baseball cap guy "went through an internal door into the third car" (TR. p. 12).

The "crew cut" officer detained three African Americans against the wall directly across from Mr. T[redacted] He pulled them over as they were walking north down the platform where the face-off had happened. Then a female officer came, and at least one other officer, to watch the three detainees on the wall (TR. pp. 12, 13).

The "crew cut" officer then went to the train cars to pull off the men who had entered the train. The officer went to the third car and "pulled that individual...yanked him off." Mr. T[redacted] said the officer's tone was "harsh or unprofessional." "He was saying things like, 'I fuckin' see you' I, you know, 'I see you in the fucking train', ...something to that effect." The crew cut officer was "very confrontational" from when he got up on the platform (TR. pp. 13, 15, 16). Mr. T[redacted] believes the person taken off of the third car was the "red cap guy" (TR. pp. 28, 29).

Mr. T[redacted] said that the "crew cut" officer then removed Oscar Grant from the second train car by approaching him from behind, "He grabbed him and pulled him out," and walked out past Mr. T[redacted] Mr. T[redacted] did not, at that point, believe the officer used physical force that was inappropriate to take Oscar Grant off the train. The officer took Grant to the concrete wall with the other people being detained. The officer did not come back to take off the third person who was still in Mr. T[redacted] car (TR. p. 14).

One detainee was "very compliant" and wasn't saying anything to the officers, but the other two were more verbal (TR. p. 18). The woman officer was telling them "you need to...sit there." Mr. T[redacted] could not hear actual words (TR. pp. 18, 19). But two of the detainees were "much more confrontational." He heard the detainees say "something about not a real cop" and felt there were "'pig' comments, things like that, just random, you know, heckling I guess" (TR. p. 20). Two of the people on the wall were "talking back" to the woman officer and the crew cut officer. He concluded this by how the detainees moved physically, with their upper bodies and heads going forward, and arms gesturing, they were getting in the officers' faces. Mr. T[redacted] saw one detainee, who he described as "the more heavy set guy...he probably had the biggest stature of the guys on the platform...was doing a lot of talking" (TR. p. 21). This detainee wore a white T-shirt (TR. p. 29). Mr. T[redacted] saw Oscar Grant "having some sort of verbal dialogue with the officers" but did not see any belligerent behavior from Grant toward the officers. At this point Mr. T[redacted] did not have a clear view of Grant because he was blocked by an officer's body. Mr. T[redacted] did not see any detainee use any physical force, or attempt to use physical force, against the officers (TR. p. 22).

Throughout the incident, Mr. T[redacted] observed that Grant was always in the south facing position along the wall. He did not see Oscar Grant change his position or move from a southerly position to a northerly position (TR. p. 27). He believes he saw one of the detainees using a cell phone, but couldn't say who it was (TR. p. 28). Mr. T[redacted] observed one of the detainees sitting down "on his butt on the left side" (TR. p. 14).

The "crew cut" officer walked up or towards the front of the train, and after looking through the windows, started to come back to the detainees at the wall. Mr. T[redacted] heard the officer say, "that motherfucker's going to jail" then the officer "hustled" or "hurried" up to Oscar Grant and kneed him (TR. pp. 13, 15, 16). When Mr. T[redacted] saw the officer knee Grant, and "there was, from my perspective, no provocation for him" to do so. The officer lifted his left leg and struck Grant in the abdominal area. Grant was still standing but "kind of knelt over" (TR. p. 24).

After that, the officers started to put Oscar Grant onto the floor of the BART platform, stomach down, face forward. Grant was questioning why he was being handcuffed. "He didn't simply lay down on the floor and put his hands behind his back. At the same time, the officers didn't instruct him to" (TR. p. 25). Mr. T[redacted] believed Oscar was the first of the detainees to be handcuffed.

After the crew cut officer "kneed" Grant, a commotion broke out on the train, as people objected to the officer's treatment of Grant. People were screaming, "What the hell are you doing" and trying to take photographs. At this point a fight almost broke out in Mr. T[redacted] train car between a woman who was trying to film the incident and another woman who was in her way (TR. p. 16). At the same time, the third person from Grant's group who had ducked into their train car but not been detained suddenly left the car. He said, "Get the hell out of the way" to Mr. T[redacted] and another man blocking the door (TR. p. 29). Mr. T[redacted] was concerned about what this person might do when he left the train and continued to watch him

(TR. p. 18). Later, that person was among the many in the crowd who was shouting at the officers, "Hey, what the hell are you doing" while filming the incident (TR. p. 29). In this tense atmosphere, Mr. T[redacted] was concerned for their safety and concentrated on shielding his wife (TR. pp. 18, 29).

Mr. T[redacted] was not looking when the shooting happened. He was distracted by the escalating commotion in his train car and positioning himself to protect his wife. He heard the gunshot, looked up and saw the "crew cut" officer's back facing him. Mr. T[redacted] thought this officer fired the shot (TR. p. 25). He observed "shock" on the face of Johannes Mehserle and "confusion" on the face of the woman officer (TR. pp. 25, 26).

The reaction inside his train car was "people...upset...and eventually crying" (TR. p. 26). Very quickly after the shooting, the doors closed and the train continued on. The third member of Grant's group who had entered Mr. T[redacted] train car, exited and returned with a video camera, did not get back into the car before the train left the Station (TR. p 30).

Q. M[redacted] T[redacted]

1. Background

M[redacted] T[redacted] was a witness to the incident. He was interviewed by BART Detective Power on January 9, 2009. Jesse Lad of Meyers Nave attempted to contact him using all the phone numbers that he provided to BART on January 9, 2009. All of the phone numbers provided have been disconnected and T[redacted] has changed jobs since the BART interview. Meyers Nave was unable to interview Mr. T[redacted]

R. K[redacted] V[redacted]

1. Background

K[redacted] V[redacted] was a witness to the incident and videotaped the incident. BART Detectives Power and Smith interviewed her on January 11, 2009. This interview was videotaped. She (or perhaps Attorney John Burris) provided her video to a news channel. She gave her chip to Mr. Burris to make a copy and return to her. She told Detectives Smith and Power that she would provide them with a copy of the video. She testified at the Preliminary Hearing in the criminal case against Johannes Mehserle. Jesse Lad of Meyers Nave set up an interview with her. He arrived at the interview location at the agreed time and she did not appear for the interview. He noted that she seemed hesitant to be interviewed in all of their phone conversations. He left her a subsequent telephone message, but she did not return his call. Meyers Nave was unable to interview Ms. V[redacted]

S. B[redacted] W[redacted]

1. Background

B[redacted] W[redacted] was a witness to the incident and may have videotaped the incident. BART Detective Carter stated in a report (BART IA 0630) that B[redacted] W[redacted] initially contacted her and told her that he had videotape of the incident. Detective Carter called him four times and asked him to provide the videotape. He did not

provide the videotape. Jesse Lad of Meyers Nave made five telephone calls to Mr. W and left two messages for him. He did not return Mr. Lad's calls. Meyers Nave was unable to interview Mr. W

T. A Z

1. Background

A Z was a witness to the incident. She was interviewed by BART Detective Carter on January 3, 2009 by telephone. Jesse Lad of Meyers Nave interviewed her on June 8, 2009. A Z was interviewed in Meyers Nave's Oakland office at approximately 2:55 p.m. on June 8, 2009. Her interview transcript is attached as Exhibit 27.

2. Impression

Ms. Z appeared to be credible and candid during the interview, and her statements were fairly consistent with the statements her husband provided a few days earlier at their home in Castro Valley.

Ms. Z did not witness the Oscar Grant shooting on New Year's Eve, and unlike her husband did not recognize Oscar Grant when shown a picture of Mr. Grant and various other individuals that may have been involved in what transpired at the Fruitvale Station on New Year's Eve. Ms. Z also did not observe anything that took place on the BART platform at the Fruitvale Station. Rather, Ms. Z recollections from that evening primarly related to an altercation that took place on the BART train before the train arrived at the Fruitvale Station, as well as some general observations she made about BART operations that evening.

3. Incident

Ms. Z indicated that she went to San Francisco to watch the fireworks on New Year's Eve with her husband, son and daughter. The Z family rode BART to and from the Castro Valley BART Station to watch the fireworks that evening. Ms. Z recalled taking either the 10:50 or 11:10 train and believes they arrived in San Francisco around 11:40. Ms. Z indicated that she and her husband were not under the influence of any alcohol or mind-altering substances that evening.

Ms. Z recalls that an African American male was rolling marijuana, counting pills and drinking vodka on their BART ride into the City. Ms. Z believes that he boarded the train at the Coliseum or San Leandro Station. Ms. Z was concerned about this behavior, so she reported it to a BART officer at the Embarcadero Station who she thinks was wearing a SWAT uniform.

After watching fireworks in the City Ms. Z and her family boarded a BART train at the Embarcadero Station to return home. Ms. Z indicated that it took approximately an hour to get into the Embarcadero Station, and when they arrived in the Station she descirbed it as being very crowded, so much so that she was surprised that "someone didn't fall on the tracks." Eventually she and her family boarded a Pittsburg train and then transferred to a Castro Valley train at the West Oakland BART Station.

Ms. Z[redacted] and her family boarded the front car of the train that was headed to Castro Valley through the second doors from the front. Ms. Z[redacted] initially stood in the middle of the car, which she described as being "like sardines." At the Lake Merritt Station about half the train emptied out, and Ms. Z[redacted] said she was able to sit down in the back of the train because a woman got up and allowed her to sit with her daughter.

Once the train was in motion from Lake Merrit en route to the Fruitvale Station, Ms. Z[redacted] began to observe fighting on the train. "What caught [her] eye was this one guy had one guy in a headlock and he's just hammerin' at him . . ." After Ms. Z[redacted] observed this portion of the altercation, her husband called the train operator and told the operator that there was a big fight on the train. Ms. Z[redacted] then heard the train operator ask what train they were on, so she pushed the call button and said that they were on 381. After she informed the train operator what train they were on, the Z[redacted] family moved to the second car.

Ms. Z[redacted] could not clearly see the black male that was in a headlock in the above-referenced altercation, but described the white male who had him in a headlock as follows:

> I couldn't see the—I couldn't see the guy that was in the headlock, but the gentleman that was . . . And the reason I seen him so clearly and he stood out, because, number one, everybody was dressed in dark clothines that was up there. Number two, they were either African American of Hispanic. But the gentleman was . . . He was as fair as you are. He was short. He was stocky. He had not shaved, shaved, shiny head, but a, a real tight shaved head—you know, just a little bit of growth.
>
> And the reason that he stood out was because he had on—I have never seen—he must've had a XXXL white T-shirt on. He had a light denim pair of jeans and I, he probably had white tennis shoes on . . .

Ms. Z[redacted] also indicated that he appeared to be 38-40 years old, or perhaps younger. She also described him as "kinda rough around the edges," and indicated that he was between 5'6" and 5'8". While Ms. Z[redacted] did not see the face of the black male who was in a headlock, she did indicate that he was wearing dark clothing and had a black jacket on that reminded her of a derby jacket.

Ms. Z[redacted] also described seeing a Mexican guy throwing punches into the crowd and mouthing off. She described him as between 5'10 and 6'0" tall. When I later showed her photographs of various individuals who were potentially involved in the incidents that evening, she indicated that she was 75% sure that J[redacted] B[redacted] was this Mexican male.

4. Fruitvale Station

Ms. Z[redacted] estimated that there were approximately 8 people involved in the altercation. Eventually the train pulled into the Fruitvale Station and the doors opened. She said that at that time she saw three "kids" in their 20's get off the train from the first car, but did not know whether they were involved in the altercation. She recalled that one of these three males had "dreads."

Ms. Z[redacted] could not see what was going on outside on the platform and does not remember seeing any Police Officers at the Fruitvale Station. She did say that she could hear commotion and loud noises, as well as people screaming "Stop." She also observed people hanging outside of the door. When Ms. Z[redacted] heard the gun shot, her husband called the BART driver and told her to shut the doors. Ms. Z[redacted] was very concerned for her safety. Ms. Z[redacted] also indicated that while she was surprised that the BART train was not detained to question the passengers after the shooting, she was happy because she wanted to get her kids off the train "so bad."

U. D[redacted] Z[redacted]

1. Background

D[redacted] Z[redacted] was a witness to the incident. He was interviewed by BART Detective Carter on January 3, 2009 by telephone. He gave testimony at the Preliminary Hearing in the criminal case against Johannes Mehserle. Jesse Lad of Meyers Nave interviewed him on June 6, 2009. His interview transcript is attached as Exhibit 28.

2. Impression

D[redacted] Z[redacted] was interviewed at his home in Castro Valley on June 6, 2009. While Mr. Z[redacted] was generally credible, at times during the interview Mr. Z[redacted] seemed to attribute some level of reliability to information that was brought to his attention through individuals affiliated with attorney Michael Rains. Nonetheless, Mr. Z[redacted] distingushed those limited circumstances and seemed to provide information from the standpoint of his own recollections. Accordingly, it is not our impression that Mr. Z[redacted] has materially altered his recollection of the events that transpired on New Year's Eve based on any information that might have come to his attention through his communications with anyone associated with attorney Michael Rains.

Mr. Z[redacted] did not witness the Oscar Grant shooting on New Year's Eve, nor did he observe any of the actions of any BART Police officers on the platform of the Fruitvale Station. However, Mr. Z[redacted] did indicate that he witnessed an altercation that took place on the BART train prior to the shooting. In addition, Mr. Z[redacted] said that he alerted the BART driver about this altercation. Mr. Z[redacted] also brought forward numerous personal observations that he made about BART operations on New Year's Eve.

3. Incident

Mr. Z[redacted] indicated that he went to San Francisco to watch the fireworks on New Year's Eve with his wife, eleven-year-old son and six-year-old daughter. The Z[redacted] family rode BART to and from the Castro Valley BART Station to watch the fireworks that evening. Mr. Z[redacted] guessed that he and his family boarded a BART train on their way to watch firewoorks in San Francisco sometime between 10:45 and 11:00 p.m. Mr. Z[redacted] indicated that he and his wife were not under the influence of any alcohol or other substances that evening.

After watching fireworks near the foot of the Embarcadero, Mr. Z[redacted] and his family boarded a BART train at the Embarcadero Station. The original train they boarded was not headed towards Castro Valley – and was possibly headed towards Pittsburg/Bay Point – so the Z[redacted] family transferred to a different train somewhere in the East Bay on their way back to Castro Valley from watching the fireworks.

Mr. Z[redacted] and his family boarded the front car of the train that was headed back to Castro Valley through the rear doors of the car. Mr. Z[redacted] described the train as being very crowded and "standing room only." According to Mr. Z[redacted] he became aware of an altercation because he observed shouting, a lot of pushing and shoving, and punches being thrown. At that point Mr. Z[redacted] and his family relocated to the back of the first car, and he believed that his wife and children were seated near or in the rear seats of the first train. Mr. Z[redacted] stood in the aisle way near the back of the car to create a barrier between his family and the altercation.

Mr. Z[redacted] did not see the start of the altercation, but he informed me that he did see the altercation as it progressed. Mr. Z[redacted] indicated that quite a few people were involved in the altercation, and estimated that it involved 10 people, "plus or minus." Mr. Z[redacted] observed part of the altercation from the back of the front BART car, and part of the altercation from the front of the second BART car as he and his family moved yet again. In fact, Mr. Z[redacted] indicated that he viewed most of the altercation from the very front of the second car.

Mr. Z[redacted] indicated that there seemed to be two groups of indiduals involved in the altercation. He described a larger group of all black males, but was unable to clearly distingush between them: "they all looked similar, uh, they, similar clothing, uh, you know, the big baggy jeans, the big shirts, the big jackets. Everything was – they looked similar. I, I couldn't pick one particular." Mr. Z[redacted] also described a smaller group of hispanic individuals being involved in the altercation, as well as one white male who seemed to be affiliated with the hispanic group.

While Mr. Z[redacted] informed me that he could not really distinguish between the black males involved in the altercation, he was able to describe the white male that was involved in the altercation: "He was shorter than me. I'm about 5'10" so he was shorter than me, had a very short, if not shaved head, with some minor growth. Um, Stocky build, was wearing a white T-shirt, very large, uh, had some tattoos on his forearms. I believe they were even green ink – uncolored, just green ink." He also estimated that the white male was around 30 years old. According to Mr. Z[redacted] he observed this white male tied up wrestling with and punching a black male. Mr. Z[redacted] further described this particular altercation as follows: "[T]hey were upright; they weren't wrestling on the floor. They were shoulder to should[er], hunched over, gripping each other, trying to sneak in whatever punches. They were pushing each other against the poles, the seats, the doors."[10]

[10] Mr. Z[redacted] informed me that through his interaction with Mr. Rains' office he has come to learn that the white male's name is D[redacted] H[redacted]

Mr. Z[redacted] desribed the black male involved in the altercation with this white male as being dressed similarly to the others in his group, with big baggy pants. Mr. Z[redacted] also believes he had a jacket on, but could not describe the jacket in any specific detail. Later in the interview Mr. Z[redacted] indicated that he came to learn through someone from Michael Rains' office that this black male involved in the altercation with the white male was Oscar Grant, but he does not have an independent recollection of the individual being Oscar Grant. Furthermore, Mr. Z[redacted] indicated that while he vaguely remembers seeing Oscar Grant on the train sometime that evening, he could not place Mr. Grant as the individual in the fight with the white male. Mr. Z[redacted] also informed me that he did not have any independent recollections of Mr. Grant other than getting a glimpse of him on the train.

Mr. Z[redacted] indicated that he was reasonably confident that C[redacted] R[redacted] Junior was involved in the altercation. When asked to place a percentage on how confident he was, he replied "75% maybe." He picked Mr. R[redacted] out of a photo lineup provided to him, which he marked and which is attached as an Exhibit. Mr. Z[redacted] also marked an individual picture provided to him of Mr. R[redacted] as B-2, attached as an Exhibit.

According to Mr. Z[redacted], he saw Mr. R[redacted] throwing punches on the train, and recalled him being ingrained in the altercation, at one point stepping in for another Hispanic male "kinda tag-team style." Mr. Z[redacted] descibed Mr. R[redacted] as having big baggy dark jeans and a "louder" colored jacket. He remembered a Hispanic male on the train wearing a red jacket with gold trim or writing on it, and was pretty sure it was Mr. R[redacted] that was wearing that jacket.

According to Mr. Z[redacted] the altercation continued right up until the train doors opened at the Fruitvale Station. Mr. Z[redacted] could not accurately estimate how long the altercation took place, but his best guess was several minutes. Mr. Z[redacted] indicated that he felt extremely unsafe during the altercation. Overall, Mr. Z[redacted] described the altercation as being "kinda like a barroom fight, but obviously not in a barroom. Starts off fairly small, got to this level where multiple people were involved, and then it seemed to where they had kinda backed off and let who – I guess the focus, the originators maybe, I don't know of the fight finish it out. And I didn't see anybody of either of these groups attempting to break it up."

4. Fruitvale Station

Mr. Z[redacted] stated that when the train stopped at the Fruitvale Station, most of the black males that he believed were involved in the fight exited the train. Mr. Z[redacted] soon heard a lot of shouting and described the scene as chaotic, but could not see anything from where he was positioned in the front of the second car near the pass-through doors. Mr. Z[redacted] did not hear anything that members of the public were yelling, but he formed the opinion that it was anti-police. Mr. Z[redacted] estimated that he heard a gun shot a couple of minutes after he arrived at the Fruitvale BART Station. Mr. Z[redacted] initially did not think he heard a gun shot, but rather thought that it might have been a Taser.

Mr. Z[redacted] indicated that he called the BART driver to report the fight on the front train after the fight escalated to a pretty good level. Mr. Z[redacted] informed me that he first called her from the back of the first BART car, and told her that there was a pretty large fight on the car. The BART driver supposedly asked him which car he was on, and Mr. Z[redacted] seemed to recall his wife providing the car number to the BART driver, which he believes was 381.

Mr. Z[redacted] indicated that the BART driver then called back after some time passed and inquired whether the fight was still going on. Mr. Z[redacted] indicated that it was still going on. After some more time passed the BART driver came back on the intercom and asked whether he saw any weapons, and Mr. Z[redacted] indicated the he did not see any weapons. Mr. Z[redacted] also indicated that at some point he had asked the driver to close the train doors. Mr. Z[redacted] believed that all of his interactions with the BART train operator were handled appropriately.

Mr. Z[redacted] also described a number of observations he made about BART Police generally that evening. Mr. Z[redacted] remembers seeing BART SWAT officers wearing Tasers on their bellies. He could not remember the identity of the Station where he made this observation, but indicated he has friend at Alameda County SWAT and believes that is not recommended for an officer to wear a Taser on the belly. He also believed that too many BART officers were paying attention to whether people were paying their fares that evening versus being focused on crowd control.

Mr. Z[redacted] also indicated that he thought it was a mistake to keep the train moving after the shooting, versus stopping the car at another Station to take wintess statements. He considered that decision to be a "major mess up." Mr. Z[redacted] also indicated that not all of the people involved in the fight that evening had left the train when it started moving again after the shooting, and indicated that a number of those individual got off at the Bay Fair Station. On the whole Mr. Z[redacted] seemed extremely dissatisfied with his experiences on BART that evening.

X. INTERVIEWS WITH DETAINEES

A. F[redacted] B[redacted] A[redacted]

1. Background

F[redacted] A[redacted] was one of the people detained during the incident. He was interviewed on January 1, 2009 by BART Detectives Smith and Carter. He was also interviewed on January 12, 2009 by the Alameda County District Attorney's Office. He was interviewed by Kevin Gilbert of Meyers Nave on July 16, 2009. Also present at the interview was his attorney, John Burris. His interview transcript is attached as Exhibit 29.

Mr. A[redacted] indicated that he was with a group of friends on New Year's Eve who traveled to San Francisco to view the fireworks. During their travels, he admits to having consumed at least a glass of Hennessy, although he doubts that he was intoxicated or whether his judgment his impaired in any way (IA pg 4). Following the groups' visit to San Francisco, they boarded a return train at an unknown time, possibly around 12:30 a.m. on New Year's morning and began their journey back to the East Bay. Mr. A[redacted] suggested that they boarded the BART train somewhere towards the front of the train, possibly two or three cars back from the lead train but does not recall specifically (IA pg 5). All he was able to recall is that the train was very full and that Mr. A[redacted] and his group were all standing in the vicinity of the train doors.

The trip between San Francisco and West Oakland Station was uneventful. However, Mr. A[redacted] indicated that when the group arrived at West Oakland, at least he and one other individual in the group off boarded the train and stood on the platform briefly before re-boarding that same train. Mr. A[redacted]

indicated that they believed they needed to transfer trains as they were not sure that the train that they were on was travelling through Hayward where they were planning on travelling to (IA pg 10).

2. Prior Incident

After re-boarding the train, Mr. A[redacted] indicated that Oscar Grant and an unidentified male were involved in a "tussle," with the two yelling at each other and possibly a few punches being thrown (IA pg 10). Mr. A[redacted] was unable to indicate that the other individual confronting Mr. Grant was either a white or Hispanic male, approximately 6'5" (IA pg 9). He does not recall any other characteristics including hair or the like. According to Mr. A[redacted] the scuffle lasted only a few moments and was quickly ended without incident. He did not recall hearing any announcements on the BART speakers nor did he recall anybody calling for assistance from a train operator or anyone else.

3. Fruitvale Station

Once the train reached the Fruitvale Station, Mr. A[redacted] off-boarded and was waiting for the remainder of his group. Apparently one of the members of their group (M[redacted] G[redacted] lives within the close proximity to the Fruitvale Station. The group had not decided whether they were going to travel to M[redacted] house or whether they were going to continue on to Hayward. Mr. A[redacted] indicated that the train was stopped for a prolonged period of time. While it was stopped, he indicated that he waited outside the train with at least one other individual while the majority of their group remained on the train (IA pg 13). Ultimately Mr. A[redacted] proceeded to walk over to a bench against the concrete wall where he sat down while waiting his group.

Once he sat on the bench he was able to observe approximately four to five officers running up the stairs to the BART train that he had just exited (IA pg 19). Mr. A[redacted] positively identified Officer Tony Pirone as one of the officers involved, with Officer Pirone allegedly reaching in and grabbing Oscar Grant off of the train. Although Mr. A[redacted] does not recall seeing Officer Pirone touching Oscar Grant, he observed what he believed to be the after effects of Oscar Grant being thrown up against the concrete wall.

At this same time Mr. A[redacted] jumped from the bench and attempted to approach the officers who were then confronting his friends. However, Mr. A[redacted] was confronted by a female officer (later identified as Officer Domenici) who was standing with her back to Officer Pirone and the others but facing Mr. A[redacted] Officer Domenici had her Taser drawn and was pointing it at Grant and others in the area while telling Mr. A[redacted] to "get back or I'll Tase you" (IA pg 21-22). During this same time period, Grant had extended his arms in front of the other detainees and was advising them to "calm down" (IA pg 19-21).

Mr. A[redacted] indicated that he would walk/run up towards Domenici and then back off as she would wave her Taser in his direction and that he continued to do this until being tackled from behind (IA pg 22). Mr. A[redacted] positively identified Officer Knudtson as the officer who tackled and handcuffed him. During his arrest, the officer proceeded to place a knee on A[redacted] head and told him to "Shut the fuck up" (IA pg 40-41). He also testified that at no time did he ever take an aggressive stance or position towards the female officer (Domenici) (IA pg 30). While Mr. A[redacted] was being handcuffed, he indicated that he had his head turned away from Oscar Grant and Pirone. However he heard a loud "pop" and immediately turned back to observed Oscar Grant lying on the ground face down with at least one officer standing above him. At this

point, Mr. A[redacted] heard numerous people yelling about Grant being shot, with the officers immediately telling people to get back (IA pg 38-39).

Also significant is Mr. A[redacted] testimony regarding his cell phone. He indicated that at no time did he ever throw his cell phone at any officer. Instead he indicated that he was holding a silver Motorola Razor cell phone which flew out of his hand when he was tackled from behind by Officer Knudtson. He further indicated that that cell phone was retrieved by one of the officers and returned to Mr. A[redacted] pocket in the front of his jeans following his being cuffed and that he continues to have that cell phone, which was provided to us following the interview for inspection (IA pg 31-32). Mr. A[redacted] also indicated that his cell phone continued to be functional; including him using it to make a phone call to N[redacted] B[redacted] following Mr. A[redacted] being released from the BART Police custody on New Year's morning (IA pg 67). (The phone records should be obtained in any follow up investigation to confirm this.)

4. Post Incident

Following the shooting, Mr. A[redacted] was lifted by the handcuffs by Officer Knudtson and carried over to the concrete wall on the platform at the Fruitvale BART Station (IA pg 43). He remained at that location until being taken downstairs and placed on a bench immediately adjacent to the Station agent's booth at the Fruitvale Station (IA pg 47). Mr. A[redacted] remained on the bench downstairs for what he estimated to be approximately twenty minutes during which time he observed the paramedics remove Oscar Grant on a gurney. Shortly thereafter, Mr. A[redacted] was placed in the rear of a BART patrol car where he remained for approximately fifteen minutes while still in handcuffs. At that point an unidentified officer drove Mr. A[redacted] to the BART Police Station believed to be at Lake Merritt (IA pg 49-50).

On arriving at the police station Mr. A[redacted] was advised by the BART officer that there were no cells available as everything was filled up already. At that point, the officer exited the vehicle and left Mr. A[redacted] in the police car unattended, with the police car parked on the city street in front of the BART Police Station for approximately thirty to forty-five minutes (IA pg 50-51). Mr. A[redacted] was ultimately taken downstairs and placed in a hallway where he was watched over by an officer whom he was unable to identify where he remained for an estimated four to five hours (IA pg 55-56). Mr. A[redacted] indicated that he had attempted to ask for a drink of water and to go to the bathroom on numerous occasions, but was denied those requests for the majority of the time (IA pg 58). An Asian officer dressed in a suit (possibly an investigator in his opinion) removed the handcuffs and allowed him to use the bathroom. Shortly thereafter, Mr. A[redacted] was taken into another room for interview where he was advised that he was not under arrest and was free to leave (IA pg 59, 62-63).

According to Mr. A[redacted] he was extremely tired and dizzy and continued to tell the officers that he blacked out because he was scared and did not want to speak with the officers (IA pg 60, 63). He further admitted to having remembered a significant amount of information from the incident on the BART platform but being desirous of not talking to the police officer based upon his friend having just been shot as well his having sat in a police car for an extended period of time, followed by sitting on the hallway floor in handcuffs for over four hours (IA pg 63-64).

Following completion of the interview, Mr. A was released where upon he walked outside and proceeded to call N B on N s cell phone to find out where his friends were and possibly join them at the hospital where Oscar Grant was being treated. According to Mr. A the cell phone number of his cell phone on the night of the incident was either and was a Motorola Razor on a T-Mobile account. He believes that name on the account was F A his father (IA pg 68-69).

B. J R B

1. Background

J B was one of the people detained during the incident. He was interviewed on January 1, 2009 by BART Detectives Smith and Carter. He was interviewed by Kevin Gilbert of Meyers Nave on July 17, 2009. Also present at the interview was his attorney, John Burris. His interview transcript is attached as Exhibit 30.

Mr. B was with the group of individuals accompanying Oscar Grant who travelled to San Francisco to watch the fireworks before returning to the East Bay. On the night in question, Mr. B admits to having consumed approximately a pint of Hennessey between himself and his friends. He had approximately two glasses worth (IA pg 4-5). Following returning from San Francisco, he believes that they boarded the train car towards the front of the train, possibly within the first three but is doubtful that it was the first train (IA pg 5-6).

2. Prior Incident

While riding the train back to the East Bay, a confrontation arose somewhere in the Lake Merritt area between Oscar Grant and an unidentified Hispanic individual with the confrontation lasting approximately two minutes (IA pg 7-9). The incident involving Oscar Grant and unidentified Hispanic gentleman was uneventful and appeared to be fully resolved before the train car arrived at the Fruitvale Station.

3. Fruitvale Station

Once the train arrived at Fruitvale, the group of individuals departed from the train in possibly two separate groups. While Mr. B and his group were walking off of the train car they observed a couple of BART officers coming towards them. At this point Mr. G and Oscar Grant hopped back on the train to avoid dealing with the officers (IA pg 14). A male officer whom Mr. B identified as Officer Pirone approached the group and while pointing his Taser at them advised them to, "go sit down, go sit the fuck down" (IA pg 14). At this point Pirone was accompanied by a female officer identified as Domenici. Once the group walked over and sat down by the wall, Officer Domenici proceeded to watch them while holding her Taser in her hand and pointing it at them. While Domenici was watching over the group, Pirone proceeded back on to the train to retrieve Oscar Grant and M G (IA pg 15-16). First, Pirone retrieved Grant and was holding him by the t-shirt and kind of dragging him along until walking Grant up to the wall and slamming Grant backwards into the concrete barrier (IA pg 16, IA pg 22). While Pirone was attempting to retrieve Grant he was heard yelling, "If there is somebody else on this train, get the fuck off. Get the fuck off" (IA pg 21). At the time that Mr. B observed these comments he was sitting on the

platform against the concrete wall directly opposite the open door where Pirone was retrieving Grant (IA pg 20).

After retrieving Grant, Officer Pirone then proceeded back onto the train car to retrieve M[redacted] G[redacted] When Pirone exited the car with G[redacted] he had one hand on G[redacted] back with another on his neck and proceeded to walk G[redacted] off the train car before attempting to trip him and throw him onto the ground (IA pg 16, IA pg 30-31).

Upon seeing G[redacted] thrown to the ground, Mr. B[redacted] and the other individuals he was sitting with stood up and began yelling at Pirone. They were yelling something to the effect of, "what the fuck y'all doing him like that for" (IA pg 16). In response the female officer started cussing at Mr. B[redacted] and his group saying, "sit the fuck down" and "punk, sit the fuck down" (IA pg 28). At approximately the same time Oscar Grant was saying to the other gentlemen to, "just be cool" and "be quiet we're going to go home tonight" (IA pg 27-28). In response to Grant's comments Pirone approached Grant and, "slammed him back down again" (IA pg 28). During the same discussion, Mr. B[redacted] admitted to calling the female officer a bitch to which she responded she was going to tase him and that, "I'll fucking shoot you right now" (IA pg 28-29). Following Pirone's completion of handcuffing G[redacted] he came over and engaged Grant a second time (IA pg 33). Mr. B[redacted] did not recall any specifics other than possibly Pirone striking Grant with his elbow. After this exchange Grant removed his cell phone from his pocket and called his fiancé. At the time of making this call the officers were approximately five feet away and did not say anything or advise Grant to stop using his cell phone (IA pg 37-39). Immediately after the phone call, Pirone again engaged Grant and punched him with his elbow (IA pg 39-40; IA pg 48). In response Mr. B[redacted] began yelling at the female officer again, including he and Domenici calling each other, "a bitch," which resulted in Mr. B[redacted] being brought to his knees and handcuffed (IA pg 40).

While Mr. B[redacted] was getting handcuffed, Oscar Grant was being engaged by Pirone including being put down to the ground on his back at first. During the time that Grant was being put to the ground by Pirone, Pirone was telling him that he was going to tase him. In response Grant was saying, "no don't do that, don't do that" (IA pg 41). About the same time Officer Mehserle approached Grant and began assisting Pirone in attempting to handcuff Grant. During this exchange Grant was continually yelling that he could not breath and to get them off of him (IA pg 41).

Following wrestling Grant to the ground, Pirone was on Grant's neck while Mehserle was on the lower body (IA pg 52). At this time the two officers were proceeding to wrestle with Grant and appeared to be trying to retrieve his hands and place them in handcuffs. Mr. B[redacted] believed he saw Mehserle grabbed Grant's left arm bring it back to Grant's waist where a handcuff was put on that arm (IA pg 54). During this time he believed that Officer Pirone remained over Grant's head and was continually looking down on Grant's back (IA pg 55). To the best of Mr. B[redacted] recollection he never observed Mehserle reach for Oscar's right arm (IA pg 56). He describes Pirone as attempting to restrain Grant's head while Mehserle squats over Grant's lower body. During the efforts to cuff Grant, Mehserle stood up, drew his weapon and fired a single shot into Oscar Grant's back (IA pg 42).

4. Post Incident

Following the shot Mr. B[redacted] was yelling, "call the ambulance." The only response he recalls was one of the officers (unidentified) yelling, "when you shut the fuck up, we'll call the ambulance" (IA pg 44). Mr. B[redacted] was then removed from the platform and taken downstairs and put in the back of the police car where he remained for about thirty minutes before being taken to the BART Police Offices (IA pg 45). Once arriving at police station, he was taken in and placed in a small cage where he remained handcuffed until being questioned.

While in the cage, he was approached by Officer Pirone who came up to the cage and put a chair directly in front of it and proceeded to kick his feet up and, sitting in front of the cage, laugh (IA pg 46). No words were exchanged between Mr. B[redacted] and Officer Pirone other than Pirone's laughing and staring at Mr. Bryson.

Mr. B[redacted] remained in the cell for an unidentified period until being brought in for questioning somewhere between seven and eight o'clock in the morning. At this point the handcuffs were removed and he was advised that he was not under arrest but was read his Miranda Rights (IA pg 65). Mr. B[redacted] indicated that he was fearful of telling the BART officers everything since he was afraid that they were going to attempt to pin the murder on him (IA pg 65-66).

C. N[redacted] R[redacted] B[redacted]

1. Background

N[redacted] B[redacted] was one of the people detained during the incident. He was interviewed on January 1, 2009 by BART Detectives Smith and Carter. He was also interviewed on January 12, 2009 by the Alameda County District Attorney's Office. He was interviewed by Kevin Gilbert of Meyers Nave on July 16, 2009. Also present at the interview was his attorney, John Burris. His interview transcript is attached as Exhibit 31.

Mr. B[redacted] is a nineteen year old male who was present during the New Year's Day incident occurring at the Fruitvale BART Station. His testimony regarding the events leading up to the arrival at Fruitvale is unremarkable. Mr. B[redacted] does not recall exactly which train car he boarded, but believed it was somewhere in the middle of the train (IA pg 5).

2. Prior Incident

He confirmed that he was accompanying a group of other individuals who, following their trip to San Francisco, were returning to the East Bay when an altercation ensued between Oscar Grant and an unidentified individual. Mr. B[redacted] was unable to provide any information or description of the individual whom Grant was scuffling with, but indicated that he was in very close proximity and could hear the two arguing although he does not recall the substance of those arguments (IA pg 6-8).

3. Fruitvale Station

Once arriving at the Fruitvale Station, Mr. B stepped outside of the BART train where he proceeded to wait for the remainder of his group. At that point he was confronted by a male officer who had his Taser drawn and was pointing it at Mr. B and others (IA pg 14, 15). The officer approached Mr. B and the others and told them to "Get the fuck on the wall" (IA pg 16) and "I'll shoot" (IA pg 14, 15). At that time, there was only a single officer confronting B and his friends (IA pg 14, 15) who Mr. B identified as Pirone (IA pg 16). According to Mr. B testimony, the officer directed Mr. B and his friends to go sit against the wall, which they complied with (IA pg 18).

At that point, a female officer identified as Domenici approached the group to assist Pirone, with the female officer then drawing her Taser and pointing it at Mr. B and his friends and stating "If you move, I'll fucking shoot" (IA pg 18). Mr. B then observed Officer Pirone approach the train car and remove Oscar Grant followed by M G out of the car by physically grabbing those individuals and throwing them up against the concrete wall, with Oscar Grant first followed by G To his recollection, Oscar Grant stumbled backwards and hit the concrete wall with his back up against the wall after being thrown by Pirone (IA pg 19-20, 22, 23). These actions caused Mr. B to believe that Officer Pirone had thrown Grant. Mr. B recalls Pirone telling Grant to "Get your bitch ass on the wall" (IA pg 28).

Immediately thereafter, Officer Pirone returned to the train car where he grabbed M G, with one of M G hands behind his back in what appeared to be a wristlock and Officer Pirone's other hand on the back of M G neck, either holding on to M G hair or the back of his neck (IA pg 25). Mr. B was sitting almost directly across from the train car while Pirone removed Grant (IA pg 21). Shortly thereafter, Pirone came up to the group and started yelling to them to, "Shut the fuck up" While Domenici stood with her Taser pulled out; waiving the Taser between Mr. B and his friends who were standing against the wall as well as the other individuals standing around in close proximity (IA pg 24, 26). At this same time, Mr. B was telling Domenici to "Get that fucking Taser out of my face, bitch" (IA pg 27).

As matters progressed, Mr. B was able to observe an interaction between Pirone and Grant wherein Pirone either punched or pushed Grant either with his elbow or fist (IA pg 29, 33-34, 70). Following Pirone punching or pushing Grant, Mr. B observed Grant step forward and put his hands out in between his friends and the officer, saying something to the effect of "Be cool" or "Calm down" (IA pg 70, 71). At this point Mr. B recalls Pirone approach Grant and shoving him, pushing Grant to the ground (IA pg 37), with Grant saying "Don't Tase me. I got a daughter. Please don't tase me" (IA pg 73).

Mr. B then turned his attention towards F A who was then being confronted by an unidentified officer (IA pg 34). The unidentified officer apparently came up from behind and tackled A and was kneeling on top of A and applying handcuffs (IA pg 31). Mr. B was unable to hear any specific comments but did hear a gunshot (IA pg 31, 38). At that point he turned back towards Oscar Grant who he observed laying on the ground face down approximately five to seven feet away from him. Oscar Grant raised his head slightly and said, "You shot me." N was able to observe smoke coming out of Grant's back but did not hear any comments from any officers at that time other than the various officers telling people to stay back (IA pg 38-39) and Pirone responding to the individual requests to call an ambulance by stating "I'm not calling nothing until you all shut the fuck up" (IA pg 40).

Sometime prior to the shooting, Mr. B observed an unidentified male voice talking to the members of his group and calling them, "bitch ass nigger" (IA pg 55), but he is unable to confirm if it was an officer or some other individual. Mr. B was only able to indicate the phrase was uttered from a male voice that he was unfamiliar with somewhere off to his right in the area was Mehserle and Pirone were confronting Grant (IA pg 54-55).

4. Post Incident

After the incident, Mr. B remained sitting on the platform for a prolonged period of time, but not yet handcuffed (IA pg 40). Originally he was sitting on the ground with his back against the concrete wall. He was there long enough to observe the paramedics arrive on site, load and remove Grant from the platform. At some point during the paramedics working on Grant, Mr. B attempted to stand up but became woozy, potentially as a result of all of what he classified as "all of the blood," then he sat down on a bench (IA pg 40-41). During this time, he was accompanied by at least one officer and believed it was Officer Domenici. Shortly thereafter, he was handcuffed and taken downstairs where he was placed in a police car. While waiting in the car at the Fruitvale Station, he was approached by Pirone. Once Pirone opened the door to the police car, Mr. Bryson asked him why he shot Grant, to which Pirone started laughing and said "so, you think I'm the one that shot him" and laughed again (IA pg 45).

According to Mr. B testimony, he turned to Domenici and asked her to "save me," immediately after he observed Grant being shot (IA pg 73-74). Mr. B indicated that he was fearful of his life and did not know what to expect and was hoping that the officer would help him and save him from any further violence. During this testimony Mr. B appeared visibly distraught and uncomfortable and was unwilling to elaborate on any of the comments beyond simple short answers.

Following being removed from the platform and taken downstairs, Mr. B indicated to the officers that he was having trouble breathing and did not feel well (IA pg 48). Mr. B indicated that officers called for a medical team who evaluated him, including his breathing and heart and advised him that he was, "faking it." Mr. B recalls the officers giving him a choice of either being taken to the hospital for treatment or being taken to the police station, but that the officers told him he would be in custody longer if he chose to go to the hospital (IA pg 48). Based upon his desire to be released as soon as possible, Mr. B declined any medical treatment and refused to sign any paperwork from either police or medics until he was able to have an attorney.

Following being placed in the BART Police car, Mr. B was driven to the BART Station which he believed was at the corner of 8th and Oak (IA pg 50). Once arriving at the Station he was advised that it was too crowed and that he needed to remain in the police car for a while (IA pg 51). At that point the officer allegedly departed the vehicle and left Mr. B in the vehicle unattended for an unidentified period of time, possibly somewhere in the neighborhood of twenty minutes before an officer returned and delivered Mr. B downstairs (IA pg 51).

Mr. B was placed in a small room with an open doorway which contained a number of printers. He indicated that he was accompanied by another officer who sat with him during his stay in that room, with Mr. B alternating between sitting on the floor and sitting in a chair (IA pg 53). He remained in handcuffs until approximately 6:00 a.m. when the handcuffs were removed and he was taken in for an

interview. While waiting to be interviewed, Pirone kept waking past the room where Mr. B[redacted] was being held, smirking and giving "mean faces" (IA pg 57-58).

Once taken into the interview room at approximately 6:00 a.m., Mr. B[redacted] told the officers that he, "blacked out," and did not want to talk with them (IA pg 59-60, 63). He indicated that he did not wish to discuss any matters with the officers because he did not have an attorney and was also fearful of the officers. Mr. B[redacted] did indicate that he had a recollection of the incident but that he did not want to discuss the matters with anyone from BART. At that point Mr. B[redacted] was released and he proceeded to the hospital where Grant was being treated.

Once at the hospital he charged his cell phone in the waiting room lobby before receiving a call from F[redacted] A[redacted] from Fernando's cell phone. He was unsure of the time but indicated that the sun had just came up and it was possibly somewhere in the range of 7:30 a.m. to 8:00 a.m. (IA pg 65-66).

D. M[redacted] R. G[redacted]

1. Background

M[redacted] G[redacted] was one of the people detained during the incident. He was interviewed on January 1, 2009 by BART Detectives Smith and Carter. He was interviewed by Kevin Gilbert of Meyers Nave on July 16, 2009. Also present at the interview was his attorney, John Burris. His interview transcript is attached as Exhibit 32.

M[redacted] G[redacted] was one of the individuals accompanying Oscar Grant's group to San Francisco on New Year's Eve and was also present at the Fruitvale BART Station at the time of the incident giving rise to this investigation. Mr. G[redacted] admits to having consumed some Hennessy prior to the incident, but was unable to identify the amount. He indicated that he consumed that drink some time around ten or eleven o'clock in the evening (IA pg 4-5).

2. Prior Incident

Once returning from San Francisco, Mr. G[redacted] believed that his group had boarded the train somewhere towards the front, believing that he was in the back of the second car (IA pg 8). During the ride from San Francisco to Fruitvale, he recalls an argument and brief pushing match between Oscar Grant and an unidentified White male. He believed that the incident lasted only a few seconds and was uneventful (IA pg 6-7).

3. Fruitvale Station

Once arriving at the Fruitvale Station, the group of individuals began having a discussion as to whether they were going to exit the train at that point or continue to ride the train until it arrived at the Hayward BART Station where everybody's cars were parked (IA pg 10). Ultimately, the group exited the train and proceeded to walk down the platform, although the group was divided into groups for no apparent reason. After exiting the train Mr. G[redacted] encountered a BART officer coming up the platform or possibly coming up the escalator. To the best of his recollection there may have been three or four officers at that point,

including at least one male and one female but Mr. G was not sure either as to the number or the make up of the officers (IA pg 12-13).

The group of officers began stopping certain individuals, including J B, C R and N B and told those individuals to go sit on the wall. At that time Oscar Grant and Mr. G had just exited the train and were back behind everyone else (IA pg 14). Upon seeing this Mr. G and Grant re-boarded the train in order to attempt to avoid the officers. Once Grant and Mr. G re-boarded the train, they split up with Grant who was walking through to another train car (IA pg 15, 16). At that time Officer Pirone walked up to the train car with his Taser out and yelled into the car something to the effect of, "whoever else was involved or whoever else that was on the train that was with this group of people need to get off the train" (IA pg 17). Pirone was also saying for the people to, "get the fuck off the train" (IA pg 18).

As Pirone walked up and down the platform outside the train, he ultimately met Oscar Grant outside one of the exit doors for the train. Mr. G was able to observe this interaction from his position across the train car (IA pg 18). At that point, Pirone was touching Grant from the back and proceeded to escort Grant to the wall where Grant sat down next to J B and N B IA pg 19). Of significance is that Mr. G did not testify that Pirone had thrown Grant to the wall as testified by some of the others in this group.

Pirone then returned to the train car and came and grabbed Mr. G from the back, grabbing the back of Mr. G hair and/or neck. Prior to grabbing Mr. G Pirone did not say anything to Mr. G that he heard (IA pg 20). While Pirone was pulling Mr. G off the train car he told Mr. G "I told you to get the F off the train" or "get the fuck off the train" (IA pg 20). Pirone then escorted Mr. G across the platform until he swept Mr. G feet out from underneath him and threw him to the ground. At that point Pirone kneed Mr. G in the back and he placed him in handcuffs (IA pg 21). About the same time, the other individuals with R including J B, N B and Oscar Grant started yelling at Pirone, "What the fuck is y'all doing" (IA pg 21).

In response to the group standing up and yelling at the officer, Pirone ran back to Oscar and shoved Oscar Grant against the wall (IA pg 22, 24). While Pirone was engaging Grant, Mr. G was able to hear people calling each other, "bitch" although he was unable to identify who specifically was saying the words. He believes that term was being uttered by at least one male voice and believed it was both his friends as well as the officers that were using the phrase (IA pg 26). During this time the female officer (later identified as Domenici) was standing next to the group and had her Taser pointed at N B (IA pg 27). During the same period of time F A () was standing off to the left of the group walking back and forth talking on his cell phone. Mr. G observed A get tackled from behind. Immediately prior to him being tackled he recalls that A was on his cell phone talking to someone but did not see what happened to the cell phone after he was tackled (IA pg 28-29).

During the same time period Oscar Grant was somehow brought to the ground. Mr. G only recalls seeing Pirone and Mehserle wrestling with Grant and tying to put handcuffs on Grant (IA pg 30-31). To the best of Mr. G recollection he recalls seeing Mehserle trying to put handcuffs on Mr. Greer and having placed a handcuff on at least one hand. After seeing a handcuff being placed on one hand Mr. G attention was diverted toward A who was then being tackled further down the platform (IA pg 31).

Mr. G recalls seeing Pirone on Grant's back, with Pirone's knee on either Grant's head or neck and Pirone's hands towards Oscar Grant's neck (IA pg 32). Further Officer Pirone's attention appeared to be focused downward looking at Oscar Grant (IA pg 32-33). Mehserle had positioned himself towards Grant's feet and was kneeling at first and then stood up. Mr. G originally observed Grant on his side followed by the officers attempting to role him over onto his stomach and then trying to handcuff him (IA pg 33). After being rolled over onto his stomach Grant's arms were somewhere out to his sides. Mr. G did not see the actually shot but recalls hearing it and looking over and observing the officers finish handcuffing Grant after being shot (IA pg 38). He also believes he heard someone say, "Get the handcuffs off of him before the press gets here," followed by the officers removing the handcuffs from Grant (IA pg 38).

Following the shooting Pirone walked off and went to talk to Mehserle. To the best of Mr. G recollection Mehserle and Pirone walked on the platform where they proceeded to talk for a while. Following that, Mr. G does not recall ever seeing Mehserle again (IA pg 39).

4. Post Incident

Following the shooting Mr. G remained on the platform in handcuffs for approximately twenty to thirty minutes before being taken downstairs and removed from the Station by an officer he identified as Knudtson (IA pg 43, 45). Knudtson escorted Mr. G downstairs and also drove him to the BART Police Station. During the drive to the station Mr. G asked Knudtson what happened and what caused the exchange between the officers and Mr. G group. Knudtson is alleged to have responding by stating, "Well basically they got a description of some males in black or something that was fighting" (IA pg 45). After being taken to the BART Station Mr. G was placed in an office room where he was watched over by another officer. While being walked into the room he was able to observe Pirone sitting in a small room which also contained a cage where J B was being confined. Mr. G suggested that Pirone was changing and he believed he saw Pirone in an under shirt or something in the same room as J B (IA pg 46-47).

Mr. G remained in the conference room with handcuffs on until he was questioned sometime around 8:30 in the morning. During the time he was in the conference room, he was only supervised for approximately thirty minutes by an unidentified officer before being left alone for the remainder of the time (IA pg 48). Ultimately Mr. G was brought in for questioning with the handcuffs removed; he was advised of his Miranda Rights as well as told that he was free to leave (IA pg 52). Mr. G proceeded to disclose what he recalled to the investigating officer followed by being released and going to meet his friends.

E. C A R

1. Background

C R was one of the people detained during the incident. He was interviewed on January 1, 2009 by BART Detectives Smith and Carter. He was interviewed by Kevin Gilbert of Meyers Nave on July 20, 2009. Also present at the interview was his attorney, John Burris. His interview transcript is attached as Exhibit 33.

Mr. R was with a group of individuals who travelled to San Francisco on the evening in question to view the fireworks. He admits to having consumed possibly two glasses of Hennessy in the evening, potentially an hour to an hour and a half before arriving at the Fruitvale BART Station (IA pg 5).

2. Prior Incident

According to Mr. R recollection, Mr. Oscar Grant was involved with an unidentified individual on the BART train somewhere between the West Oakland Station and the Lake Merritt Station (IA pg 8). He indicated that that altercation lasted approximately two minute and consisted primarily of yelling and a small amount of pushing and shoving (IA pg 8). He indicated that no punches were thrown and that he was approximately three to four feet away from the altercation when it occurred. To the best of his recollection, nobody notified the train operator nor did there appear to be any other person taking notice or exception to the altercation.

3. Fruitvale Station

Mr. R cannot recall whether his group left the train all at the same time or if they left individually. He suggested that he may have been approximately a minute or two behind the others in his group as they were debating whether to exit at the Fruitvale Station or to continue to Hayward where their cars were parked (IA pg 9). However, he recalls getting off the train and being approached immediately by two BART officers, including a male and a female (IA pg 10). He indicated that the male officer (identified as Pirone) had his Taser out at that point and was holding it in his hands (IA pg 11). The officers immediately directed Mr. R and the others in his group to get against the wall, referring to the concrete barrier wall immediately adjacent to the BART train (IA pg 11). According to Mr. R the male officer's exact words were to "sit the fuck down" (IA pg 12).

According to Mr. R he and his friends complied with the exception of M G and Oscar Grant who had jumped back on the train. After Mr. R friends approached the wall, the female officer then proceeded to supervise him and his friends while the male officer (identified as Officer Pirone) then returned to the train to retrieve Grant first, followed by G Mr. R indicated that he was able to watch Pirone the entire time as the train car in which Grant was located was located directly opposite from where Mr. R was sitting. During this time, the female officer (later identified as Domenici) was standing over the men holding her Taser out and pointed (IA pg 18) but does not recall any comments from her (IA pg 19).

Contrary to some of the other testimony, Mr. R indicated that Oscar Grant was escorted off by Pirone. Although Pirone did have his hands physically on Grant and was grabbing Grant by the arm or shoulder, Mr. R did not testify to Grant being thrown against the wall as has been indicated by other witnesses (IA pg 13). According to Mr. R Pirone then returned to the train car and retrieved M G with Pirone grabbing G by the back of the head and possible having an arm around G neck from behind (IA pg 14-15). Pirone escorted G off of the train car in this position following by Pirone attempting to do a, "hip toss" of G and throwing G to the ground. Following Mr. G being taken to the ground, Mr. R indicated that Pirone proceeded to drop a knee on G approximately three times, with the knee drop appearing to be done forcefully and intentionally according to Mr. R Following the knee drops, Mr. R indicated that G was handcuffed (IA pg 16-17).

Following handcuffing of G[redacted] Pirone rushed over to Oscar Grant and proceeded to either push or hit Grant, although Mr. R[redacted] was unsure of the specifics of the hit (IA pg 19). Mr. R[redacted] only recollection was that he saw Grant be pushed hard up against the concrete and glass wall, with Grant's head hitting the wall very hard and forcefully. During this exchange, Pirone was continually pushing and/or possibly elbowing Grant in the upper body. During the same time period the female officer was advising them to, "sit the fuck down" (IA pg 19-20, 21). Grant's response to the officers was "Please, ok, okay, please don't. I have a daughter" (IA pg 20). Mr. R[redacted] also recalls Grant stepping in front of J[redacted] B[redacted] and putting his hands out in front of him, saying "Sit down, sit down, relax, calm down" (IA pg 38).

Grant had held his arms out to the individuals beside him and was telling them to, "calm down" and to relax so they could go home (IA pg 38). Mehserle and Pirone then proceeded to wrestle Grant to the ground, with Grant falling over sideways and landing on top of Mr. R[redacted] leg. Mr. R[redacted] indicated that he was yelling to the officers to get him off his leg which resulted in the officers then rolling Grant from his back over onto his stomach (IA pg 24, 26-27).

Once Grant was rolled onto his stomach, Mr. R[redacted] was able to observe Officer Pirone at Grant's head (IA pg 32), possibly with a knee either on Grant's shoulders or neck as well as Officer Mehserle around Grant's waist and/or lower body (IA pg 29-30, 33). The officers continued to struggle with Mr. Grant for a few moments during which time Mr. R[redacted] indicated that one of Grant's arms came free and was being moved downward by Officer Pirone (IA pg 31, 32). Mr. R[redacted] was unable to see the other arm at that time.

Mr. R[redacted] then observed Officer Mehserle stand up from a squatting position and reach for his weapon with his right hand, drew his weapon and immediately fired a single shot in Grant's back (IA pg 33). Immediately after the shot, Mehserle reholstered his weapon, followed by Pirone whispering something in Mehserle's ear which lasted for only a brief moment (IA pg 34-35, 36).

4. Post Incident

According to Mr. R[redacted] he was in shock at that time and does not recall any specifics until being approached by Pirone. Pirone then advised Mr. R[redacted] o calm down and escorted him over to a bench where he sat him down (IA pg 37). At that time, R[redacted] was not handcuffed and was sitting freely on his own (IA pg 37). According to Mr. R[redacted], he remained sitting on the bench until another officers (hesitantly identified as Officer Knudtson) then ran up to him and started kneeing him in or about the neck and face and advising him to stop resisting arrest while telling Mr. R[redacted] to "Shut the fuck up. I got no problem beating your ass tonight" (IA pg 39). R[redacted] was immediately placed face down on the concrete platform and handcuffed until being picked up and taken down the escalators and seated (IA pg 42).

Mr. R[redacted] was placed in the back of a BART Police car with F[redacted] A[redacted] They were taken to the police station (IA pg 42), where Mr. R[redacted] remained in the car unattended for approximately 30 minutes (IA pg 44) until being taken into a conference room where he remained for approximately four or five hours in handcuffs (IA pg 45). The handcuffs were removed at approximately 6:00 or 6:30 a.m. when an unidentified female detective interviewed him. Despite being told that he was not under arrest and was free to leave, the detective advised Mr. R[redacted] of his Miranda rights. In response, Mr. R[redacted] did not tell them anything- speaking to the detective for approximately ten to fifteen minutes (IA pg 49). Mr. R[redacted] claimed that he was scared and didn't want to speak with anyone at that time (IA pg 49).

XI. INTERVIEW OF BART EMPLOYEES

A. K[redacted] W[redacted]

1. Background

K[redacted] W[redacted] was the train operator of the incident train. She stated that she received two intercom calls that morning telling her that there was a fight on the lead car and provided her with a description of the people involved (BART IA 0774). She then reported this information to Central. She was interviewed by BART Detectives McNack and Carter on January 2, 2009. She was interviewed by Kim Colwell of Meyers Nave on July 14, 2009. Her interview transcript is attached as Exhibit 34.

Ms. W[redacted] has been employed by BART since 1996. [redacted] Then in [redacted] she became a train operator. She had worked New Year's past in her various positions with BART but this was her first New Year's as a train operator (IA pg 3). She started at 12:01 a.m. She had no special training to deal with the event (IA pg 3). Her general training was if she saw a problem to call Central and give them specifics (IA pg 4).

2. Pre-Incident

Ms. W[redacted] waited at Daly City until her first train assignment that she picked up at Colma at about 1:00 a.m. (IA pg 6). She was assigned a Dublin/Pleasanton train and she headed off from Colma towards San Francisco (IA pg 6). When she got to Embarcadero Station she slowed down and as the Station was very crowded she waited for clearance for a supervisor on the platform to clear the train for continued travel (IA pg 7). She did not hear about the incident with a man with a gun in the Embarcadero Station until weeks after the incident (IA pg 8). That incident did not occur on her train.

She then proceeded through West Oakland without incident. Again, she did not learn of the individual jumping off the platform until weeks later (IA pg 8). That incident did not happen on her train.

Ms. W[redacted] then went to Lake Merritt and as it is a transfer Station with people are getting on and off (IA pg 9). At that time 2 black males in the second set of doors in the lead car are in the doors confused about where to go. She explains out the window to them what they can do, but that they have to get out of the way of the doors (IA pg 10).

3. Fruitvale Station

As she is pulling the train into the Fruitvale Station she gets a call on her inter train intercom from a woman in the back of the first car claiming "There's a fight on the train" and hangs up (IA pg 10). By this time Ms. W[redacted] is pulling the train into the Fruitvale Station and opening the doors (IA pg 10-11). She then radios Central and says that there is a fight on the train (IA pg 11).

At that moment a second intercom call comes from a man in what she presumes is the same car. He says "There's a fight on the train" Ms. W[redacted] says "What do they look like?", the man says "Black males", Ms. W[redacted] says "What are they wearing?", and he says "All black." She then asked if there were any weapons involved and he said "No" (IA pg 12) (BI pg 4"4-6). In the BART interview she said that the man on the intercom described "two black males" (BI pg 7:19-19). She then relays this information to Central (IA pg 12). Central tells her to hold the train (IA pg 12). In the dispatch record she says first call "...fight on lead car..." (W[redacted] communication #1 pg 1:5-6).[11] He next transmission says "...there is a black male wearing all black, no weapons involved..." (W[redacted] Communication #2 pg 1:12-13). Her third communication "...folks coming off train – looks like black male, Spanish male, white male- wearing all black..." (W[redacted] communication #3 pg 1:6).

She then goes to her window between the cab and the inside of her car and she cannot see anything because it's packed. But people are saying and gesturing that there is a fight (IA pg 13). She can see people getting up on the seats (IA pg 13). She can not see any fighting herself (IA pg 13). The people on the seats are not the ones fighting (IA pg 14).

Then she looks out her side window down the platform and sees about 4-5 black males and a Hispanic female acting agitated. The Hispanic female is "mouthing off" to someone inside the train (IA pg 17) (BI pg 4:9-10). One member of the group, a light skinned mail with puffy hair that she had talked to at Lake Merritt asks "Is 5-0 coming?" She replied in the affirmative and he told his friends they had to go (IA pg 15)(BI pg 4:10-11). She thinks there were 5-7 people in this group (BI pg 8:15-17). Ms. W[redacted] did not know if these individuals were involved in the fight (IA pg 16). As they are walking off a BART Police officer (Pirone) is coming at them from the other direction (IA pg 15). He then detains them but in an area that she can only see their heads when they are standing (IA pg 15-16).

She then saw two males one "Mexican" and one white get off the train and then get back on the train (IA pg 17).

When Pirone approaches her window she believes there was a female officer with the detainees (IA pg 18). Pirone says "What do we have here?" and she responded "Some bullshit." She went on to say "The Hispanic female in the red shirt, she was mouthing off to somebody, but that's all I know" (IA pg 18). That was the end of the conversation. He never asks if they were the guys in the fight (IA pg 19). She denies saying "Those were the guys who were in the fight" (IA pg 19) (BI pg 9:14-19 and BI pg 10:7-10).

When Pirone approached Ms. W[redacted] she described him as "assertive," coming into her personal space such that she had to pull back and hold out her palms (IA pg 21-22). She also described his stance as "aggressive" (IA pg 36).

[11] All Ms. W[redacted] dispatch communication records are attached as Exhibit 35.

Ms. W[redacted] is then shown a photograph on the Fruitvale platform taken from the area of the train operator's window and she indicates the area where the detainees were initially taken. She also indicates that if they sat down on the platform they are then gone from her field of vision, blocked by the small wall at the outside of the platform that curves in towards the train (IA pg 22-23 and Exhibits).

She is waiting for the call to release the train and she can hear people on the train and the platform saying "ohh, ohh, ohh." She can not see anything because when she looks out her side window people on the platform are blocking her view (IA pg 24). She then hears a "Boom" and she immediately calls into Central "shots fired" (IA pg 24).

She then gets an intercom call and a call from Central at the same time. The man on the intercom is saying "Close the doors and get us the hell outta here!" (IA pg 24). The call from Central is confirming her release of the train. She is trying to go, but can't close the doors because people are standing in the way (IA pg 24-25). She announces repeatedly for the passengers to get back on the train, that the doors are closing (IA pg 24). She is finally able to close the doors and tells Central that she's "ATO" – on automatic (IA pg 25).

4. Post Incident

She is then called by Central at Castro Valley and told to get off and take another train back to Daly City (IA pg 25). While she is on the platform at Castro Valley she sees the same male she had spoken to earlier at Fruitvale and asks him if it was a gunshot they heard to which he responds that it was and it was on the platform (IA pg 25).

She then operated a train back to Daly City without incident. She waited in the break room for about two hours until she went off shift (IA pg 27).

The next day when she was back at work she was contacted by Detectives McNack and Carter who wanted to interview her. She took a run on a train and when she got back to Daly City they were waiting to interview her (IA pg 28). They all met in a supervisor's office and her Union Representative Mark Ambus was there as well (IA pg 28-29). She was interviewed for about 30-45 minutes and told them what she had observed (IA pg 29).

5. Impression

Ms. W[redacted] came off as extremely credible in her interview. Her statements from the beginning have been largely consistent as to what she said and as to what she didn't say to Officer Pirone.

[redacted]

B. BART POLICE OFFICER NOEL FLORES

1. Background

Officer Noel Flores was not interviewed by BART on the night of the incident, but asked to do a police report instead. He was thereafter interviewed by BART Detectives on January 5, 2009. He was not interviewed by the District Attorney and did not testify at the criminal Preliminary Hearing.

On May 19, 2009 and June 23, 2009 Chief Gee sent letters to Officer Flores alerting him to his possible violations of policy, his potential role as a witness and ordering him to talk to BART's investigator Kim Colwell. (He stated that he did not get the May 19th letter until it came as an enclosure with the June 23rd letter.) Thereafter he was interviewed by Kim Colwell of Meyers Nave on July 2, 2009 as part of the Internal Affairs Investigation. He appeared at the offices of Meyers Nave, was given his Miranda rights and a Lybarger Admonition and then chose to speak freely. He was represented by his attorney Alison Berry Wilkinson. His letters from Chief Gee, Lybarger Admonishment and interview transcripts are attached as Exhibit 38.

2. Law Enforcement Experience/Training

Officer Flores had been with the BART Police for a little over two years at the time of this incident. He completed the academy and the BART Field Training program. He had worked a New Year's before. And at the time of this incident there may have been a BART New Year's Bulletin or training, but he doesn't recall (IA pg 6-7). Prior to the incident he had 2 hours class room training on the Taser and 4 hours hands on (IA pg 61)

3. Other New Year's Calls

He started work at 4:00 p.m. that day alone and was partnered with Officer Knutdson at about 6:00 p.m. He ended up on the platform of the West Oakland Station when a train pulled in. He saw a man come off the train who, once he saw Officer Flores, started running down the platform and jumped over the end. Officer Flores ran to the ground level to assist with the suspect who had jumped. He assisted in detaining the individual and recovering money, drugs and a gun from his pockets.

He recalls that they were at the scene of the West Oakland incident or dropping evidence off at Lake Merritt for about half an hour before getting the call to MacArthur (IA pg 10-12). They were heading towards MacArthur to assist Officer Hawkins when they heard the Fruitvale call and they change direction.

4. Fruitvale Station

He remembers the call to Fruitvale as saying "ten subjects fighting" (IA pg 13). He then recalls dispatch saying that the platform cameras showed a suspect struggling with an officer (IA pg 13-14). (None of this was actually broadcast.)

When they got to Fruitvale he asked the Station agent which platform and then ran up the stairs. He thinks Officer Knudtson was behind him. When he got near the top of the stairs he pulled out his Taser (IA pg 15). He uses a cross draw with his dominant right hand (IA pg 16). He saw a crowd approaching Officer Woffinden and ran towards it (IA pg 15). When he started running he also pulled out his baton to make it easier to run (IA pg 21).

He had the Taser for approximately two months and took it out when he did because the holster was new and because he didn't know what he would be facing once on the platform. He had pulled the Taser once before this night, but never had fired it on the job (IA pg 16-17).

He was about 60 feet from the other officers on the platform when he got to the top of the stairs. He describes them as having their backs to him and he didn't know who they were (IA pg 18). He ran closer and saw Officers Pirone and Domenici dealing with at least three detainees (IA pg 19). He also saw Officer Woffinden keeping the crowd back (IA pg 20). And he saw Officer Knudtson take someone to the ground in front of them (IA pg 30).

Officer Flores then faced off to the crowd with Officer Woffinden and had to use two hands to help him put the baton away because his belt is "so crowded" now with the Taser holster (IA pg 21). (It should be noted that the video footage clearly shows Officer Flores struggling with his baton while holding an activated Taser.) The laser dot from the Taser can clearly be seen on the buttocks of Officer Knudtson who is on the ground in front of Flores handcuffing A[redacted] This is a dangerous situation that belies a lack of training with the Taser by Officer Flores. It is also clearly an unintentional act on his part, but one that must be corrected).

His attention was focused on the crowd in front of him. He looked back at the detainees and the other officers occasionally and recalls seeing the detainees sitting (IA pg 23). He saw a "big guy" advancing and he told him to "get back, get the hell back or you are going to get Tasered" and the guy got back (IA 24). He also saw another individual on the platform who was seated and in handcuffs who was inching along the platform. Officer Flores also told him to back up and he did (IA pg 27). During this time it was so loud that he could not hear his radio despite wearing and earpiece (IA pg 32).

He was looking down at Officer Knudtson with the subject he was handcuffing when he heard a pop, he looked back and saw but could not hear Officer Guerra on the radio and then Officer Guerra ran off down the platform (IA pg 34-35). He did not know there was a shooting until later, but he did see Guerra come back with a trauma kit and he saw blood on Mr. Grant (IA pg 35).

He then saw Officer Mehserle who looked "out of it", but he did not talk to him (IA pg 40). Then he and Officer Woffinden escorted one of the handcuffed detainees down the stairs because he was yelling and carrying on (IA pg 40-41).

Once downstairs he saw Woffinden take the detainee to a police car and Flores began to use yellow tape to cordon off the area (IA pg 43). He never went back upstairs (IA pg 44). He stayed downstairs and started a crime scene log (IA pg 44).

5. Post Incident

Officer Flores was then taken back to Lake Merritt Station, put in a room and after a time someone came to do a GSR test on him (IA pg 46-47). He thinks he may have processed the evidence from the West Oakland incident and then at approximately 1:00 to 2:00 p.m. he was asked to write a statement (IA pg 48-49). After completing the statement he gave it to Det. Carter who asked for a few clarifications (IA pg 51). Then at approximately 2:00 - 2:30 p.m. he left the Station (IA pg 52).

He next worked the following Friday and Saturday then he was given a few days off by one of the sergeants (IA pg 53). He heard from Officer Pirone that he could go to a counselor. Later he had the same offer from BART, but he had already made the appointment (IA pg 54). He only found out he was on administrative leave through his counselor (IA pg 53).

He later heard from Commander Gibson that he was on leave and to call if he needed anything. He hasn't heard from anybody since then (IA pg 56).

6. Impressions/Conclusions

Officer Flores responded to a chaotic scene on the night of the incident with the clear intention of helping his fellow officers. He appropriately used the Taser to keep the crowd under control and the other officers safe. As stated above, however, he does need further training on how to holster his baton while holding the Taser as he can clearly be seen on video pointing the activated Taser at the buttocks of another officer on scene. Had Flores been bumped from behind (a foreseeable event on the crowned platform) he could have deployed the Taser darts into the buttocks of Officer Knudtson which could have caused devastating consequences. Officer Flores exhibited an open and honest demeanor during the interview and he clearly had no involvement in the shooting. Aside form the negligent use of the Taser, Officer Flores acted in an appropriate and reasonable manner in handling himself during this stressful incident.

7. Recommendations

There is no discipline recommended for Officer Flores. Officer Flores should, however, receive specific training and informal coaching on how to handle the Taser and baton simultaneously.

8. Findings

General Order No. III, General Duty Regulations - EXONERATED
General Order No. V, Weapons and Use of Force - EXONERATED
Operational Directive No 27, Code of Professional Conduct and Responsibilities for Peace Officers - EXONERATED
Operational Directive No 44, Processing and Handling Arrestees - EXONERATED
Operational Directive No 70, Delay of Revenue Trains - UNFOUNDED
Operational Directive No 74, Lethal Force/Incidents Resulting in Death or Great Bodily Injury - UNFOUNDED
Operational Directive No 75, Use of Lethal Force - UNFOUNDED
Bulletin No 08-07, Taser Less-Lethal Weapon Policy - EXONERATED

C. BART POLICE OFFICER JONATHAN GUERRA

1. Background

Officer Jonathan Guerra was not interviewed by BART on the night of the incident, but asked to do a police report instead. He was thereafter interviewed by BART Detectives on January 5, 2009. He was not interviewed by the District Attorney and did not testify at the criminal Preliminary Hearing.

On May 19, 2009 and June 23, 2009 Chief Gee sent letters to Officer Guerra alerting him to his possible violations of policy, his potential role as a witness and ordering him to talk to BART's investigator Kim Colwell. Thereafter he was interviewed by Kim Colwell of Meyers Nave on July 2, 2009 as part of the Internal Affairs Investigation. He appeared at the offices of Meyers Nave, was given his Miranda rights and a Lybarger Admonition and then chose to speak freely. He was represented by his attorney Alison Berry Wilkinson. His letters from Chief Gee, Lybarger Admonishment and interview transcripts are attached as Exhibit 39.

2. Law Enforcement Experience/Training

Officer Guerra graduated from the police academy in March of 2005 and went to work for BART. He completed the Field Training program and worked as a solo officer starting in August of 2005. He does not recall if they got the briefing on the New Year's plan by BART, but thinks it usually is discussed in briefing and that a bulletin may be posted a few days ahead. He recalls reading through such a bulletin before this New Year's.

3. Other New Year's Calls

He was partnered with Officer Guazon on the night of the incident. They were dispatched to the West Oakland Station to help with the suspect who had jumped off the platform. He was called as an evidence technician. He was asked at West Oakland how far it was from the platform to the ground so he had to return to Lake Merritt to get a tape measure. While at Lake Merritt he heard the call for the Fruitvale situation.

4. Fruitvale Station

While at Lake Merritt Officer Guerra recalls hearing a call on the radio for a 242 Battery at Fruitvale with "20 males" involved (IA pg 11). (The dispatch records do not corroborate this broadcast.) He then heard on the radio that Mehserle and Woffinden were responding and that Domenici and Pirone were already there because he knew they were dealing with someone under the influence (IA pg 12).

Officer Guerra drove directly to Fruitvale and parked in the bus zone. It took him about 5 minutes to get there (IA pg 13). He then went up the escalator to the platform where he observed Officer Pirone kneeling on the ground next to a subject (IA pg 14). He saw Officers Mehserle and Woffinden also standing near 4 subjects seated on the ground (IA pg 14).

As he ran down the platform he could see Mehserle standing over the 4 seated subjects at the wall and one more handcuffed subject off to the side (IA pg 15). Officer Woffinden was near by but not standing over the subjects (IA pg 16). Officer Woffinden had his baton out but under his arm/shoulder (IA pg 16). Officer Guerra then joined Mehserle to watch over the subjects seated on the ground (IA pg 17).

As he was standing with Mehserle he recalls Officer Pirone coming up from behind him and to his left (IA pg 17). He knows Officer Domenici was there too, but does not recall her position (IA pg 17). He thinks maybe she and Woffinden were watching the people behind them who were a "slight threat" (IA pg 18).

Officer Guerra does not remember what the detainees were saying specifically, but he does recall they were unhappy about the situation (IA pg 19). He does not recall Mehserle or Woffinden saying anything at that time (IA pg 19). He describes the noise level at this point as "above average" that he was having a hard time hearing his radio until he turned the volume all the way up (IA pg 20). He does not recall ever seeing Oscar Grant on a cell phone (IA pg 69-70).

At this point he recalls Officer Pirone walking "briskly up" and pointing out Oscar Grant and J[redacted] B[redacted] saying that they were under arrest (IA pg 21). Guerra and Mehserle begin to handcuff J[redacted] B[redacted] when the noise from behind them surged and Officer Guerra looked back around towards the train (IA pg 21). Pirone was to his left (IA pg 21). He does not recall what was said other than they were under arrest (IA pg 68-69). At this point there were no threats coming from the area of the platform toward the front of the train car (IA pg 76).

Officer Mehserle was trying to sit Mr. B[redacted] down and Officer Guerra had his cuffs in his right hand when he looked away for approximately 3 seconds. When he looked back Mehserle had B[redacted] seated on the ground (IA pg 25). B[redacted] was yelling and Guerra leaned in towards Bryson's ear and said "just put your hands behind your back and we'll figure out what the issue is" (IA pg 25). B[redacted] "got calm" and put his hands behind his back and was cuffed (IA pg 25). He checked the cuffs and felt the rear of B[redacted] waistband before things got really loud and he became distracted and looked towards the crowd again (IA pg 25).

Officer Guerra then got on his radio and asked for dispatch to release the train as he felt having it there was a safety issue (IA pg 28). He could observe Officers Domenici and Woffinden between them and the crowd (IA pg 29). Dispatch said they were releasing the train and he thinks he may have asked for more officers at that point, he's not sure (IA pg 30).

As Guerra stood up from [redacted] he recalls Mehserle moving to help Pirone with Grant. He says he cannot recall specifically what they were doing (IA pg 30-31). He generally recalls Mehserle pushing Grant "face forward," but doesn't recall if Grant was saying anything (IA pg 31). He recalls Grant "probably" having his chest on the ground, but isn't sure (IA pg 32-33). Then he sees Grant's face toward the front of the train and it appears Pirone and Mehserle are trying to "restrain him" (IA pg 33). At that moment he was distracted by Officer Knudtson running up and tackling [redacted] (IA pg 33). Knudtson was approximately 20 steps away at this point (IA pg 34).

Guerra watched Knutdson tackle [redacted] to the ground about 20 – 30 feet away and about one second later he heard a loud pop (IA pg 36 and 73). His first impression was that it was a gun shot. He was surprised (IA pg 37). He heard someone yell "Oh shit" (IA pg 38). He turned to look and saw Officer Mehserle standing with his gun out over Oscar Grant. It was held in a two hand position (IA pg 37). He saw blood on Oscar Grant's back and he immediately radioed code 3 for an ambulance (IA pg 39). He then saw the train doors close and he ran to his car for a trauma kit (IA pg 41).

When he got back he put on gloves and used a cotton pad to apply pressure to Oscar Grant's back (IA pg 42). He thinks they waited 10 minutes for medical and he kept talking to Oscar Grant, telling him to "hang in there", asking if he could hear him (IA pg 31). When emergency arrived he explained that Grant had been shot in the back and that he had been applying pressure (IA pg 54).

When he observed lieutenants arrive on scene he ran down to his car to get his camera to begin processing the scene by taking photos (IA pg 47). Then he realized that since he was involved that it probably wasn't best for him to be taking the photos (IA pg 48).

Officer Guerra was then approached by Lt. Cagaanan who asked what had happened. He said that Mehserle fired his weapon and that the subject was on the ground at the time (IA pg 49). Then he was directed to go downstairs and the involved officers were directed not to talk to one another (IA pg 50).

He then went to watch over a subject in the back of a patrol car who said he was having an asthma attack. He stood by until the ambulance came to help this person. He then noticed that [redacted] had been put in the back of his patrol car. Bryson was turned around in his seat looking back and Guerra could tell he was upset (IA pg 54-55). Guerra was then transported back to Lake Merritt by Commander White and with Officer Woffinden (IA pg 55).

5. Post Incident

Once back at Lake Merritt the involved officers were all separated and put in different offices. He received instructions from Detective Smith to call a union rep, call a lawyer and not to talk to anyone (IA pg 56). His gun was inspected, a GSR was done and then he sat for several hours (IA pg 58). He then slept on the couch in the office he was in, someone brought him some food and then he was informed they would not

be taking a statement that he should write a summary statement (IA pg 59). He was told not to do it in the Alliance system so he did it in Word (IA pg 60).

He thinks that he wrote the statement at about 8:00 a.m. and left for home around 9:00 a.m. (IA pg 62). He gave the statement to Det. Carter who asked for a little clarification and then he left (IA pg 63).

He reported back to work the following Wednesday to report to Sgt. Fueng in detectives (IA pg 65). He worked for 4 days and then was put on leave. No one asked him about the incident (IA pg 66).

On the Saturday after the incident Lt. Lucarelli called him at home to inform him that counseling services were available, but that he had to schedule his own session (IA pg 66-67).

6. Impressions/Conclusions

Officer Guerra responded alone to a chaotic scene. He acted cautiously and with the clear intention of helping his fellow officers. He consistently used his best judgment in watching over the detainees, cuffing Mr. Bryson and in continuing to watch the area for additional threats and to insure the safety of the detainees and the officers. He sprang into action immediately after the shot, calling for medical code three, the release of the train, and running for a trauma kit. He used his first aid training to get immediate pressure on Mr. Grant's wound, informed the paramedics of his actions and observations and made every effort to keep Grant's attention by talking to him. He had no involvement in the shooting. Officer Guerra acted in an appropriate and reasonable manner in handling himself during this stressful incident.

7. Recommendation

There is no discipline recommended for Officer Guerra.

8. Findings

General Order No. III, General Duty Regulations - EXONERATED
General Order No. V, Weapons and Use of Force - EXONERATED
Operational Directive No 27, Code of Professional Conduct and Responsibilities for Peace Officers - EXONERATED
Operational Directive No 44, Processing and Handling Arrestees - EXONERATED
Operational Directive No 70, Delay of Revenue Trains - EXONERATED
Operational Directive No 74, Lethal Force/Incidents Resulting in Death or Great Bodily Injury - UNFOUNDED
Operational Directive No 75, Use of Lethal Force - UNFOUNDED
Bulletin No 08-07, Taser Less-Lethal Weapon Policy - UNFOUNDED

D. BART POLICE OFFICER EMERY KNUDTSON

1. Background

Emery Knudtson was not interviewed by BART on the night of the incident, but asked to do a police report instead. He was thereafter interviewed by BART Detectives on January 5, 2009. He was again interviewed by the Alameda County District Attorney's Office on January 26, 2009. He did not testify at the criminal Preliminary Hearing.

On May 19, 2009 and June 23, 2009 Chief Gee sent letters to Officer Knudtson alerting him to his possible violations of policy, his potential role as a witness and ordering him to talk to BART's investigator Kim Colwell. Thereafter he was interviewed by Kim Colwell of Meyers Nave on July 7, 2009 as part of the Internal Affairs Investigation. He appeared at the offices of Meyers Nave, was given his Miranda rights and a Lybarger Admonition and then chose to speak freely. He was represented by his attorney Alison Berry Wilkinson. His letters from Chief Gee, Lybarger Admonishment and interview transcripts are attached as Exhibit 40.

2. Law Enforcement Experience/Training

Officer Knudtson has been a BART Police officer for over three years. He attended and completed the police Academy and the BART Field Training Program.

He had worked the New Year's before this one and does not recall receiving any special training. All he recalls is that they were partnered up at briefing and told to "stick with your partner and spread out" throughout the system. He does not recall being given or seeing any BART Bulletin about the New Year's Day plan (IA pg 6-7). He was partnered with Officer Flores at approximately 6:00 p.m.

3. Other New Year's Calls

After hearing a call of a man with a gun in San Francisco at the Embarcadero Station, they were dispatched to the West Oakland Station to meet the train. He was on the platform when the train pulled into West Oakland (IA pg 9). He observed a crush load and an individual came off the train who ran down the platform and jumped off the end. He immediately ran downstairs to assist with the suspect who jumped (IA pg 11).

Within 1-2 minutes they were downstairs with the suspect who jumped. Officer Knudtson recalls their being a number of officers there near the suspect. He was not actively involved in detaining the suspect so when a call to MacArthur came to assist Officers Hawkins and Ishimuru, he and Officer Flores were told to go by a Sergeant on the scene and they responded to MacArthur. They were at West Oakland for a total time of 5-15 minutes (IA pg 12).

In route to MacArthur they heard that there was another call to go to Fruitvale to help with officers struggling and needing more assistance (IA pg 14-15). They were told the situation was covered at MacArthur and so they changed directions and headed towards Fruitvale.

4. Fruitvale Station

He recalls hearing during the trip from West Oakland to Fruitvale that there was a "battery" (IA pg 15) (DA pg 6). He uses the word "struggle" to describe the radio traffic in the 1/5/09 BART interview (BI pg 1). He heard dispatch say they "need more officers" (DA pg 6). They parked at the Village side of the Station and went in. The Station agent pointed them to the appropriate platform.

Officer Knudtson rode up the escalator to conserve energy. He does not recall the route Officer Flores took to the platform. When he got to the top he looked both ways and saw officers at one end of the platform. He is unable to estimate the distance they were from him at that time. He does remember they were near to the front end of the train (IA pg 18).

He ran down the crowded platform towards the officers. He thinks there may have been 100 people on the platform (DA pg 8). His plan was to help the officers (IA pg 19). He was using his body as a "wedge" to get through people and yelling at them to get out of his way (IA pg 20). He slowed a little as he got closer in order to better assess the situation. He observed Officers Woffinden and Domenici trying to order people back who were not complying. He has a clear memory of Mr. A[redacted] in a gray pea coat, with a few other individuals being aggressive towards Woffinden and Domenici (IA pg 21). (He states that the aggression was towards Pirone and Domenici in the BART interview (BI pg 3).) He also saw the other officers and the detainees at the wall. He does not recall specifics about that as he saw a group of people all in dark clothing (IA pg 23). It should also be noted that in the District Attorney interview Officer Knudtson testified that he has seen Officer Domenici in the past not get a lot of cooperation, as he observed that night (DA pg 9). In the IA interview he broadened this statement to be all female officers as opposed to this one female officer.

He then observed Mr. A[redacted] engage in a throwing motion towards the officers. He did not see anything leave his hand, but assumed he threw something at Woffinden and Domenici (IA pg 22). He then tackled Mr. A[redacted] to the ground (IA pg 25). His intent was to restore order because people in front of Woffinden and Domenici were not listening to their commands. He used a blocking motion with his arms to take Mr. A[redacted] to the ground. It happened quickly (IA 27).

Once on the ground he hand cuffed Mr. A[redacted] He does not remember him struggling and does not remember getting assistance from any other officer (IA pg 27). He then heard a cell phone land on the ground near him so he took Mr. A[redacted] by the arm, told him to "back peddle" and pulled him over the platform back to the safety of the wall (IA pg 28-29). He does not recall being able to see much of what else was going on at this point (BI pg 16).

When he got back to the wall he remembers Mr. R[redacted] who was among the detainees at the back of the platform, getting up to leave the area. He and officer Woffinden detained him again and Woffinden placed him in handcuffs (IA pg 29). This happened mostly without a struggle and then as things calmed he looked over and saw Guerra applying pressure on some gauze to Mr. Grant's back. This is the first time he realized there was a shooting (IA pg 33). Before that he had heard what he thought was a firecracker and ignored it (IA pg 32).

Officer Knudtson walked over to Officer Guerra to ask what had happened and who shot him. Officer Guerra told him that it was Mehserle (IA pg 33). Knutdson then turned around and saw Officer Mehserle, who looked shocked, and Officer Knudtson said: "leave your gun in your damn holster and are you OK?" (IA pg 34 and 36). He also told him "Talk to LDF and nobody else" (IA pg 34). He asked if Officer Mehserle understood and he said "yes" (IA pg 34).

Officer Knudtson then went downstairs and directed fire and medical to the platform. He told them they had a possible GSW (IA pg 35). He then saw A[redacted] and R[redacted] and he went over to them. Mr. R[redacted] told him he was sorry and just wanted to go home and be with his kid (IA pg 35). Knudtson was with them for 5-10 minutes and then he was ordered back to headquarters by Kyle Potter (IA pg 39). He got there at approximately 2:00-3:00 a.m. (IA pg 41).

5. Post Incident

Once back at Lake Merritt he was put in a room. Someone brought him some food at about 9:00 a.m. He was never offered legal representation (IA pg 41). At some point Sgt. Ledford came in to do a gun residue check on his hands (IA pg 42). Other than that he sat there by himself until Jesse Sekhon came in close to 11:30 or 12:00 and told him to write a statement (IA pg 42). He was told to write it in Word. He gave it to Det. Maes (IA pg 42-43). It took him about 45 minutes to an hour to write the statement (IA pg 43). He was not asked questions until a week later when he gave a statement (IA 44). He left the Station for home close to 1:00 p.m. (IA pg 45).

He worked the next day, but was sent home to get some rest by Lt. Lucarelli (IA pg 46-47). He has not worked since then.

At the BART interview Officer Knudtson asked for legal representation and was told that he was told by Det. Maes and Sgt. Fueng that it would just make "it worse for yourself so you probably just need to answer the questions" (IA pg 45 and 50).

He believes he was told that he was on leave and actually had a legal representative by Officer Pirone or Officer Woffinden (IA pg 48). This occurred a week or two after the incident and after the interview (IA pg 49-50). He also states that he was never asked to do a report or follow up on his tackling and arrest of Mr. A[redacted] (IA pg 53-54).

Officer Knudtson also relates that BART Lt. Langer called him to inform him of threats against him and the other officers as a result of this incident (IA pg 64). No offers to facilitate protection were ever made. Officer Knudtson went to his own home agency to do that (IA pg 67).

6. Impressions/Conclusions

Officer Knudtson responded to a chaotic scene on the night of the incident with the clear intention of helping his fellow officers. He consistently used his best judgment when arriving on the scene and by tackling Mr. A[redacted] who he observed taking aggressive actions towards Officers Domenici and Woffinden. He used an appropriate level of force in the take down of Mr. A[redacted] and in removing him to the wall for his own safety. His demeanor and the quality of his statements show consistency and honesty. He had no

involvement in the shooting. Officer Knudtson acted in an appropriate and reasonable manner in handling himself during this stressful incident.

7. Recommendation

There is no discipline recommended for Officer Knudtson.

8. Findings

General Order No. III, General Duty Regulations - EXONERATED
General Order No. V, Weapons and Use of Force - EXONERATED
Operational Directive No 27, Code of Professional Conduct and Responsibilities for Peace Officers - EXONERATED
Operational Directive No 44, Processing and Handling Arrestees - EXONERATED
Operational Directive No 70, Delay of Revenue Trains - UNFOUNDED
Operational Directive No 74, Lethal Force/Incidents Resulting in Death or Great Bodily Injury - UNFOUNDED
Operational Directive No 75, Use of Lethal Force - UNFOUNDED
Bulletin No 08-07, Taser Less-Lethal Weapon Policy - UNFOUNDED

E. BART POLICE OFFICER ANTHONY PIRONE

1. Background

Officer Anthony Pirone was interviewed by BART on the day of the incident. He was thereafter interviewed by the Alameda County District Attorney's Office on January 26, 2009. He had a second BART interview on March 17, 2009 and testified at the criminal Preliminary Hearing on May 27, June 3 and June 4, 2009.

On May 19, 2009 and June 23, 2009 Chief Gee sent letters to Officer Pirone alerting him to his possible violations of policy, his potential role as a witness and ordering him to talk to BART's internal affairs investigator Kim Colwell of Meyers Nave. Thereafter, he was interviewed by Kim Colwell on July 10, 2009 as part of the Internal Affairs Investigation. He appeared at the offices of Meyers Nave, was given his Miranda rights and a Lybarger Admonition and then chose to speak freely. He was represented by his attorney William Rapoport. His letters from Chief Gee, Lybarger Admonishment and interview transcripts are attached as Exhibit 41.

Unlike all of the other officers who were interviewed except Officer Domenici, Officer Pirone appeared with his badge prominently displayed on his belt and wearing his firearm.

2. Law Enforcement Experience/Training

Officer Pirone has been employed with BART as a police officer for four and a half years. He went to the San Jose Evergreen Police Academy and successfully completed the BART Field Training Program. Prior to BART, Officer Pirone was in the military police for the US Marines off and on for eleven years. He also

went through the police academy for the Marines. He had use of force and laws of arrest training in the Marines, but no Taser training. He had Taser training at BART for a total of six hours. He was trained to use a cross draw with his weak hand (IA pg 11). He does not recall receiving any special instructions or training from BART to deal with the New Year's shift other than to be with a partner. He had worked three prior New Year's. He has learned about what to expect on New Year's from talking to other officers. He indicated that BART has "very minimal" crowd control training (IA pg 16).

3. Other New Year's Calls

Officer Pirone partnered up with Officer Domenici at 6:00 p.m. on the evening of the incident. Their first call of significance that night was a 10:00 p.m. call to stop a fight in the bus zone of the Coliseum Station (IA pg 19). They only had to use verbal presence to stop the dispute. The next call was around 12:15 a.m. for fireworks fired at a BART train. They responded to the location and could not confirm the problem. They returned to the Fruitvale Station (IA pg 23).

It was after 1:00 a.m. and they were standing in the free area of the Fruitvale Station when debarking passengers told them that there was a fight up on the platform. They "ran" up to the platform and there was no one there when they got up there (IA pg 24). Earlier that night they heard calls of people with guns at the Embarcadero and West Oakland Stations (IA pg 26).

Officer Pirone states that he and Officer Domenici were coming back down from the phantom fight at Fruitvale when they observed a fight between several individuals in the Station. Officer Pirone ended up handcuffing one of the individuals and taking him to the back of their police car (IA pg 28-30). Pirone began writing up the report and Domenici went over to the Station agent's booth. At that time he hears a call for "Boy 10 we have a 242 on the train, five black males wearing black, no weapons seen, lead car" (IA pg 31) (in fact such a dispatch was never made). He immediately tells the Station agent to watch the prisoner in his car and he heads up to the platform (IA pg 31-32).

4. Fruitvale Station

Officer Pirone goes up the escalator and looks around. He is the only police officer on the platform, his partner (Domenici) is downstairs at the booth dealing with something else (BI #1 pg 10:14-15). Once on the platform, Officer Pirone sees no one behind him and notices a group of individuals in front of him matching the description, plus a female outside the lead car (IA pg 34). In his first BART interview he says he saw "five" males (BI #1 pg 4:23-24). There was nobody coming up or down past him (IA pg 34-35) (BI #1 pg 5:20). The rest of the platform was empty (IA pg 36)(BI #1 pg 5:20) (DA pg 5:202-205). The platform video shows numerous people on the platform. It shows him walk past a group of African American males making his way towards the front of the train.

Officer Pirone begins walking towards the group he sees at the front of the train and he takes out his Taser (IA pg 37). He thinks there is a high probability that someone in this group had a gun (PH V5 pg 73:19-74:21). He does not call for backup at this time and he doesn't recall why (DA pg 6:262-7:269). He sees two people (G[redacted]nd Grant) jump back on the train (IA pg 37-38). The three remaining males are walking towards Pirone as if to pass him by on the platform. He does not know what happened to the female (IA pg 40). He stopped the three males and asked them to get against the wall (IA pg 41). They are complaining

and swearing and he ordered them to sit. He pointed his Taser at them, and then calls for Domenici to come "Code 98" (IA pg 44-45). Once he showed his Taser, all the individuals went to the wall and sat down (IA pg 45). They were all seated with their buttocks on the ground (IA pg 46-47). It took a minute or two for Domenici to get there after he called for her (IA pg 47). The detainees continued to curse at him but he did not respond (IA pg 48).

Officer Domenici arrived and Pirone told her to "watch these guys" (IA pg 49). He then looks in the train and sees Oscar Grant walking between cars. He tells him to "get off the train." Pirone hit the glass of the train with his hand to get Grant's attention (IA pg 52). When he didn't comply he told him to "get off the, fucking train" (IA pg 50). He then took Grant over to the wall and told him numerous times to "sit down" and "sit the fuck down." He eventually went into a crouch position (IA pg 50-51).

Officer Pirone then went back to the train to get Mr. G[redacted] He stood at the door of the train and announced himself as the police and ordered G[redacted] off. G[redacted] did not come so Pirone holstered his Taser and went into the train car. People parted for him and he found G[redacted] standing in the aisle not making eye contact (IA pg 53-54). When G[redacted] won't come off Pirone grabs him and G[redacted] pulls away. Pirone then spins him around and grabs him to take him off the train. He marches him across the platform and pushes him towards the wall so that he gets off balance and falls against the wall with his hands out (IA pg 56-57).

G[redacted] reacted by spinning around towards Pirone and Pirone, expecting a punch, takes G[redacted] to the ground (IA pg 59). He then begins the handcuffing process of G[redacted] but claims that he kept looking up at the other detainees and Domenici wherein he observes Grant attacking Domenici (IA pg 60-61). He sees Grant "hit her arm away" (IA pg 75). (In the DA interview he says that Grant hit Domenici's arm and he heard him say "No bitch you need to fucking let me go, you ain't shit, you aren't- you ain't even a real fucking cop" (DA pg 17:736-739). In the second BART interview he says he doesn't know if Grant made contact with her (BI #2 pg 18:13-14). None of this testimony is supported by the video which shows him only looking at G[redacted] It also shows that there was no attack or even touching of Domenici by Grant. Officer Pirone says he never sees Mr. Grant using his arm to push his friends back from Domenici (IA 78-79). Again, the video clearly shows this move by Grant. Grant is not seen yelling at Domenici in this section either and she does not say Grant did or said this.)

Officer Pirone claims that initially Grant was at the north end of the detainees on the platform and he shifts to the south end (IA pg 65). He then steps over to Grant and Grant attempts to punch him and to kick him in the groin. Pirone thinks "I've got a fight now" (IA pg 67). Pirone is able to grab Grant's arm as he takes a swing at Pirone and pushes Grant against the wall (IA pg 68-69). He then sees and feels Grant kicking at his groin twice and making contact once (IA pg 69)(DA pg 61:2690-2696). He has never been kicked in the groin before while working for BART (PH V5 pg 128:3-129:6). Pirone says he "feel like I'm fighting for my life at this point..." (BART #2 pg 23:20-21). (None of this appears to have happened during the video sequence of this event.)

Officer Pirone then grabs Grant by the back of his head and bends him over at his waist. Pirone then lets go and deploys his Taser pointing towards Grant (IA pg 71). He told him to sit back down and he does (IA pg 71-72). Officer Domenici is somewhere behind him at this point (IA pg 72-73). Up to this point he has not radioed for back up (IA pg 74). (He does not put Grant in handcuffs despite the fact Grant just tried to punch him, kicked him in the groin and Pirone felt that he was "fighting for his life.")

He then sees Domenici dealing with three other makes and he calls for more officers (IA pg 74-75).

Officer Pirone sees more officers running towards him up the platform. He clearly recalls Mehserle, but isn't sure about the others (IA pg 81). He then left Mehserle with the detainees and walked to the front of the train to speak to the driver (IA pg 82). He did not know the driver.

Officer Pirone says he asks the train operator, K[redacted] W[redacted] "What do you got?" And she says "those five you've got over there were the five causing the problem on my train" (IA pg 83). He then asked her if anyone needed medical attention and she says "I can't really say, they were standing on the seats causing a problem" (IA pg 83). Officer Pirone says Ms. W[redacted] said she saw the five people being detained standing on the seats (IA pg 83-84). (In the initial BART interview he says Ms. W[redacted] said "...but it was those five that you have and they were just causing a ruckus, fighting with somebody on the train" (BI #1 pg 7:15-16). In the DA interview he says she said "I don't know but they were fighting, they were doing shit on this ah they were doing something on this car that was causing a problem" (DA pg 19:839-843). Then in the second BART interview he says she said "The five that you off-boarded, those were the ones causing a problem on my train." He comments "Those were her exact words..." (BI #2 pg 47:18-20). In the Preliminary Hearing he testified that he then said to her "What kind of a problem?" and she responded "I'm not sure. I couldn't see. Crush load" (PH V5 pg 14:4-5). He then starts walking back and called in to release the train (IA pg 84).) (Ms. W[redacted] categorically denies that this is what she said. She insists she did not know if the people being detained had anything to do with the fight. She directly contradicts Officer Pirone's testimony.)

Officer Pirone hurries back to the detainees, and Mehserle or Guerra asks what he has. Pirone points out G[redacted] and Grant and says "he's going for 148, he's going for 148" (IA pg 85). Mehserle and Guerra then handcuff the individual kneeling next to Grant (IA pg 88).

Officer Pirone then recalls having a conversation with Grant about Grant's 4 year old daughter and Grant calls him a "Bitch Ass Nigger." Pirone responds to Grant by stating: "Bitch Ass Nigger huh?" and that's when the handcuffing starts (IA pg 91 – 92) (PH V5 pg 24:14-17). He then recalls pushing Grant down and trying to hold his right side with his body weight. He has both his knees on Grant's back or head and Grant wriggles free (IA pg 93). He says he never saw Grant's hands (IA pg 94). In his first BART statement Pirone says that the first time Grant begins to violently resist is when they are attempting to handcuff him (BI #1 pg 15:20-23). (Officer Pirone leaves out the attempted punch by Grant, the two knee strikes towards his groin the grabbing of Domenici and the rest of the details he comes up with much later after watching the videos of his actions.)

Officer Pirone states that Officer Mehserle tugs at Grant's arms and then Grant struggles free of Pirone so Pirone switches sides on Grant's body (IA pg 94-95). He and Mehserle are both yelling at Grant to get his arms behind his back (IA pg 95-96). They each yelled it at least twice (IA pg 96). Grant started to squirm free so his "right shoulder" came "off the ground" (IA pg 96). When this happened Pirone spun his weight around to Grant's other side and forced the right shoulder back down on the ground (IA pg 97-98).

Officer Pirone "does not recall" if he's ever had training on how to use his knees and hands to hold someone down. He "doesn't know" if it's improper to put your knee on someone's head to hold them down (IA pg 98-99). He also "doesn't know" if his body weight on Mr. Grant may have prevented him from getting

his hands out (IA pg 100). (Every police offer is trained and retrained in how to use control holds, including knees and hands to hold a struggling suspect down. Additionally, the video clearly shows that Grant's arms are trapped under him due to the weight applied by Pirone and maybe even Mehserle. When Pirone takes his weight off Grant, Grant immediately puts both hands behind his back for cuffing.)

After switching position Pirone hears Mehserle yell "I'm going to Tase him, I'm going to Tase him." Pirone is then waiting for the Taser (IA pg 101). In the DA interview he adds in that Mehserle said "His hands are in his waist band- his hands are in his waist band" (DA pg 26:1150-1151). He then sees Mehserle disappear from his peripheral vision and hears Mehserle in a strange voice say "Tony, Tony, get back" (IA pg 101). Pirone jumps up and the bang went off (IA pg 101-102). Pirone thought the Taser malfunctioned (IA pg 103).

Officer Pirone then looked up and saw the gun in Mehserle's hands and an "Oh shit" look on his face (IA pg 104). He saw Grant trying to get up and told him to lie back down, he then called for code three medical (IA pg 104). He was surprised that Mehserle had shot Grant (IA pg 105).

Officer Pirone told Grant to "relax" and told Mehserle to handcuff Grant because he was still unsearched (IA pg 107). One of the other detainees became very vocal in his protests at that point (IA pg 108). Guerra went for the trauma kit, Grant was unhandcuffed and Pirone held his hand and talked to him (IA pg 109). Guerra came back and applied pressure and Pirone called for command staff response (IA pg 109).

When Pirone was on the radio Mehserle came up to him. After he got off the radio Mehserle said "Tony, I thought he was going for a gun" (IA pg 112). Pirone then gave the order to clear the platform (IA pg 113). Pirone told Sgt Alvarez what had happened and he went downstairs from the platform (IA pg 116-117). He saw Commander White downstairs and when he went to tell her what had happened she ordered him to go stand by one of the vehicles in the free area (IA pg 117). He then heard from the individual in the back of the car that he was having an asthma attack and he waited with him until AMR arrived. The individual refused medical treatment and Pirone tried to have him read the form to sign, but he said he could not read (IA pg 118). He was then ordered to return to Lake Merritt with Commander White and Officer Domenici (IA pg 120).

4. Post Incident

Officer Pirone was placed in a conference room and waited a long time until Jesse Sekhon came in and gave him the LDF number (IA pg 121). He was moved to another office and given some food and then asked to write a report by Commander White and Sgt. Fueng (IA pg 122). He was told that he was to write the Crime Report but that they didn't want him to write it in the system (IA pg 122). They brought him more food and he waited longer (IA pg 123). He was then taken into a room with Sgt. Fueng, Det. Enriquez, Det. McNack and his attorney David Mastagni Jr. and he gave a statement (IA pg 124-125). He recalls the interview going for approximately an hour and a half (IA pg 125). He was then allowed to leave. He recalls it was close to noon (IA pg 125).

Officer Pirone has not worked since that time. He believes he found out he was on administrative leave from Commander Gibson (IA pg 126). He believes Com. Gibson also offered counseling and then Officer Pirone called the other officers and told them (IA pg 127-128). Com. Gibson asked him to relay the

information to the other officers (IA pg 130). Officers Guerra, Domenici and Knutdson all expressed concern that they were hearing this from Officer Pirone and not management (IA pg 135). Officer Pirone told the Commander that the other officers should hear it from "someone in the department" too and Gibson said he would "take care of that" (IA pg 133-134).

In the beginning Com. Gibson would call once a week to let Officer Pirone know what was going on. Gibson told him of the accusations in the press and the leaked private information. Officer Pirone also asked about the video where he is alleged to have punched Grant because he "didn't think it was right that it's all one sided here" (IA pg 131-132).

Officer Pirone has also put in for training while on leave and been refused by Lt. Franklin (IA pg 134).

5. Impressions/Conclusions

The actions of Officer Pirone started a cascade of events that ultimately led to the shooting of Grant. In this case, Pirone and Domenici unnecessarily separated from each other minimizing their effectiveness and tactical options. In fact, they were separated from the outset of this incident. Pirone was dealing with a person under the influence of alcohol while Domenici handled a disturbance at a ticket booth. Both were potentially dangerous situations. Compounding problems, Pirone left a drunken individual in the custody of a Station agent. Had that situation escalated, such as the detainee kicking out car windows or a medical emergency, the Station agent would not have been in a position to properly handle the situation.

When the incident disturbance call was broadcast, Officer Pirone abandoned his partner, Officer Domenici, rather than remaining with her to act as a cover officer and working together as a team. He also did not inform her of what he was doing in responding to the incident call until he was up on the platform. This was a disturbance call and did not warrant such a hurried solo response.

Officer Pirone invoked concerns over the fact that there were two calls that night where firearms were believed to have been involved. Yet, Pirone not only confronted a very large crowd by himself, he did so without his partner. Had Pirone been threatened in anyway, Domenici was not in a position to assist him. Pirone's false sense of urgency led him to wade into a crowd and confront multiple suspects with a Taser as his primary force option.

Officer Pirone reported that he believed there was a possibility someone was armed with a firearm, yet opted to deploy the Taser. The adage of "do not take a knife to a gunfight" is applicable here. The Taser is not an appropriate force tool when dealing with a potentially lethal encounter. Had Pirone and Domenici responded together and worked as a team, their safety could have been enhanced by one officer deploying the Taser and one officer acting as lethal cover should a deadly force encounter take place.

Officer Domenici reported that upon arriving at the platform, Pirone already had people lined up against a wall. Pirone informed Domenici that he had to get another person off the train and left Domenici to guard the remaining people. According to Domenici, these detainees would not sit down, and there were people (not known if was the detainees) who were yelling expletives at Domenici. Domenici drew her Taser and pointed the red laser on the detainees. Three of the detainees sat down as directed by Domenici, however,

according to the Domenici, Oscar Grant did not sit down as directed, but crouched. Pirone left her alone with individuals that Pirone felt were uncooperative and possibly armed. This was not good team work.

Although he had a heightened sense of peril through the potential presence of firearms, Pirone did not request additional officers or a backup at that time. When asked why he did not request backup, Pirone stated, "I do not recall."

When going after Oscar Grant, Officer Pirone says he saw him trying to walk through the interior of the train. Pirone opined that Grant was involved in the disturbance and wanted to detain him. Pirone walked along the train with his Taser extended towards the windows in a very aggressive stance. He then knocked on the window of the train and motioned for Grant to exit the train. According to Pirone, Grant ultimately complied but this was only after Pirone had to swear at him, using the "f-word" frequently, in front of a number of passengers. Although it is acknowledged that use of foul language can be a tool at times, Officer Pirone was dealing with a large and unruly crowd and likely raised the level of hostility of that crowd by this repeated use of the "f-word."

Oscar Grant was reportedly challenging why he was taken off the train and using profanity towards Pirone. Pirone reported that he placed Grant against the same wall as the other detainees and told him to sit down. Grant partially complied by squatting or crouching against the wall.

Then, leaving Domenici to guard the four suspects, including one whom Pirone described as "openly hostile," Pirone off loaded an additional passenger whom he believed was involved in this incident. Again, Pirone admits and numerous witnesses confirm that he used the "f-word" over and over again. M[redacted] G[redacted] and Pirone then became involved in an altercation which was not captured on video. According to Pirone, M[redacted] G[redacted] assumed a fighting stance. Before G[redacted] ould assault Pirone, Pirone threw him to the ground and placed him in handcuffs. Pirone reported at that time, one of the other passengers who was detained (Grant) started "name-calling" and started to stand up. Pirone reported that he directed Grant to sit down.

The videos provide insight as to what took place during that encounter. It appears that during or immediately after the encounter between Pirone and G[redacted] Grant and the other detainees stood up. Domenici can been seen talking to the detainees and trying to control them. According to Pirone, he could see that his partner was "overwhelmed because now Oscar I think started to, ah after he hit her I don't know if was starting to grab her or do something but his hands were up in the air and I walked over there and I grabbed him and I told him, 'Hey, you need to sit down.' And I could tell ...that he was the most aggressive out of the three." The video, however, shows a completely different story, one of Grant pushing his friends back from Domenici and no touching of her ever taking place.

After G[redacted] was cuffed by Pirone, Pirone walked directly to Grant. According to Pirone, he "grabbed him and I tried to control his arms by grabbing each one, pushed him against he wall and at that point he's – he started to, ah he tried to punch me....Then he started kneeing me, then he kicked me and that's when I put up a forearm to, ah to the upper region of his body and I don't know if I hit him."

Again the video reveals a different story. Pirone approached Grant, grabbed hold of him and pushed him against the wall. Grant did not appear to assault Domenici. After Pirone pushed Grant against the wall, he appears to have struck him one time in the head or facial area with a fist. Grant partially and then completely sat down. There is no indication that Grant kneed Pirone in the groin as he claims.

The video shows Pirone pulling his Taser and pointing it at the remaining suspects and directing them to sit down. As this was occurring, Domenici turned away from her partner to face other persons who were approaching them from behind. Additional BART PD officers arrived on the scene. Domenici would never return to her partner's side. Officer Pirone did not attempt to handcuff Grant at this time, despite the fact that he claims that Grant had assaulted him.

Although Pirone claimed to have a heightened sense of danger, was outnumbered and was about to confront numerous persons involved in a dispute, Pirone did not request additional police resources to the scene. Pirone stated he "did not recall" why he made this decision. While this may be true, it is indicative of an officer who did not have a heightened sense of danger that he claimed, which challenges his credibility when weighing the reasonableness of his application of force. Further, his actions displayed a lack of objective reasoning. Pirone admittedly off-loaded Grant whom he described as being openly hostile and cussing. Yet, Pirone left his partner alone to control not only Grant, but three other detainees. He unnecessarily placed Domenici in a very precarious position.

In his statement, Pirone stated that he could see that his partner was overwhelmed and had been assaulted by Grant. Had that been the case, Pirone should have made an effort to restrain and handcuff Grant, not make him sit-down. Further, the video did not reveal the assault described by Pirone. The tape did not reveal the kicks or other assaults that Pirone alleged were directed at him. When given the opportunity, Pirone did not report that he had struck Grant in the face. Pirone's statement is self-serving in that it describes an assault by Grant and then in response, Pirone "may" have hit Grant. The facts are to the contrary.

Current BART PD policy General Order § 3.321 requires that officers report force which results in "considerable physical force." Considerable physical force is that force which results in apparent physical injury to the person against whom force is directed. Considering the autopsy of Grant revealed that he had sustained "prominent periorbital edema" and a one half inch area of hemorrhage on the left parietal area of the brain, the evidence suggests the fact that Grant may have suffered considerable force at the hands of Pirone.

Additionally, Pirone's use of force did not appear to be an effort to overcome any resistance on the part of Grant. Grant was standing but had made no apparent efforts to strike either Domenici or Pirone. Pirone did not appear to make any professionally accepted effort to verbalize with Grant to cause him to sit down; nor does it appear that Pirone took any other professionally recognized steps to control the volatile and tense situation other than admitting that he told Grant "to sit the fuck down." The evidence presented on the video, as well as the actions of Pirone, compels the conclusion that Pirone used force against Grant as a first resort and even then the use of force by Pirone was not for any of the purposes recognized by the California Penal Code. Consequently, the force did not appear reasonable, justifiable or excusable.

Officer Pirone also completely misrepresents what K[redacted] W[redacted] the train operator, told him. His story of what she said changes and shifts. Her version is more credible. Pirone appears to be changing, shifting and shading the facts to put his actions and conduct in a more favorable light.

Further, Officer Pirone admits to using the word "nigger" while he was detaining Grant. When asked about this in the interview, Pirone admitted to uttering "nigger" in response to the use of the word directed to him by Grant. While there may perhaps be some limited circumstances where an officer's use of a curse word may be understandable, and perhaps even excusable, but in a situation where the utterance of an expletive by a law enforcement person is likely to escalate tensions and exacerbate matters, the expletive must be viewed more critically. From the statements of the witnesses, listening to the audio, and observing the video, there can be no doubt that by the time Pirone directed the offensive word "nigger" to Grant, the atmosphere on the platform of the Fruitvale Station was highly charged, and it is not unreasonable to characterize the scene as racially charged and very tense. For a white law enforcement officer to utter the word "nigger" to an African American male while detaining him in the tense racial atmosphere at the Fruitvale Station undoubtedly contributed to the escalation of tensions. "*Today it [nigger] remains one of the most racially offensive words in the language.*" [The New Oxford American Dictionary, Second Edition, p. 1149.] The use of such a word diminished Officer Pirone and the BART PD. Officer Pirone's choice of the word "nigger" in this instance cannot, and should not, be excused, justified or go unpunished.

As other officers, including Officer Guerra, stood guard over the detainees, Grant can be seen talking on his cell phone. When he concluded the conversation, he pointed in the direction of Pirone. Grant then stood up as Pirone approached Grant and forced him to sit back on the ground. Pirone then struck Grant in the face with his left knee. This action further incited the crowd. Pirone did not follow up or attempt to take Grant into custody at this time by handcuffing him. This use of force by Pirone appears to be unprovoked, without justification and unnecessary to the detention of Grant – it can be fairly viewed as a punitive action. Pirone did not report in his initial statement that he struck Grant in the face with his knee. Further, Pirone accomplished his apparent intended goal to have Grant sit down. Once down, Pirone kneed Grant in the face. If, as Pirone contends, Grant assaulted his partner and him, the appropriate measures for Pirone to have taken would have been to handcuff Grant, inform him that he is under arrest and prepare to take Grant into custody. Pirone did none of this. In fact, the guarding officers did not assist Pirone and instead, engaged in trying to control the actions of other detainees. Pirone disengaged with Grant, but continued an apparent dialog with Grant as he stood over him.

The autopsy report revealed that Grant suffered from trauma to his facial area. The investigation leads to the possible conclusion that the injuries to Grant's face were suffered at the hands of Pirone. Pirone did not report the knee strike during this investigation. Further, the verbal and physical interaction between Grant and Pirone and the lack of any effort by Pirone to take Grant into custody leads to the conclusion that again the use of force against Grant by Pirone was not intended to cause the arrest of Grant, overcome Grant's resistance or prevent Grant from escaping as required by California Penal Code Section 832. Absent those circumstances, it appears that Pirone's use of force was not reasonable and was without justification.

Ultimately, Pirone determined that Grant should be arrested for 148 PC. Officer Mehserle attempted to force Grant into a prone position. Pirone became involved in the altercation with Grant, ultimately placing his knee on Grant's neck and head area. Grant turned onto his stomach. Pirone remained kneeling on

Grant's head and neck area and can been seen on the video placing his full weight on Grant. Pirone remained upright and looked towards the south as Mehserle tussled with Grant's lower extremities. As related above Pirone denies training on the use of his hands and knees in detaining an individual and denies knowing if his full weight on the head and back of Oscar Grant might have prevented him from extricating his arms. This assertion by Pirone lacks credibility.[15]

6. Recommendation

Officer Pirone's overly aggressive and unreasonable actions and conduct in violation of policy and acceptable standards, contributed substantially to the escalation of the hostile and volatile atmosphere during the course of the incident. Pirone was, in large part, responsible for setting the events in motion that created a chaotic and tense situation on the platform, setting the stage, even if inadvertent, for the shooting of Oscar Grant. Pirone's repeated, unreasonable and unnecessary use of force; his willful and reckless conduct that endangered the safety of the public and his fellow officers; his failure to be forthcoming about the true events; his changing and shifting stories; his manifest lack of veracity; his professionally inappropriate demeanor; his use of a racially offensive word; and his excessive use of expletives, warrant a recommendation that Officer Pirone be terminated from his employment with BART.

Many of Pirone's actions, each standing alone, separately and independently, are of such a serious nature that termination is warranted. Specifically:

- Creating a chaotic and hostile atmosphere on the BART platform through his inappropriate language and demeanor;
- Repeated excessive and unwarranted use of force on Oscar Grant;
- Untruthfulness about Grant's actions in allegedly assaulting him;
- Repeated use of inappropriate language, including use of the "f-word" and the "n-word";
- Untruthfulness in describing his own actions; and/or
- Untruthfulness in describing the train operator's statements.

BART's "Positive Discipline Guideline" Operational Directive No. 77 provides that "termination may occur in those few instances where a single offense is so severe that the application of the Positive Discipline system is unwarranted or inappropriate." The severity of Pirone's conduct during the course of the incident and post incident demonstrate behavior and conduct that is unacceptable and contrary to the standards expected of a police officer. As such, termination is clearly warranted pursuant to Operational Directive No. 77 §III E 8, 10 and/or 15 (see also, Employee Relations Guideline #21). As noted above, there are numerous separate and independent reasons that warrant a recommendation of termination, each standing alone.

[15] A comprehensive analysis of Officer Pirone's narratives and contradictions, prepared by Dr. Timothy Armistead, is attached as Exhibit 42.

7. Findings

General Order No. III, General Duty Regulations - SUSTAINED
General Order No. V, Weapons and Use of Force - SUSTAINED
Operational Directive No 27, Code of Professional Conduct and Responsibilities for Peace Officers - SUSTAINED
Operational Directive No 44, Processing and Handling Arrestees - SUSTAINED
Operational Directive No 70, Delay of Revenue Trains - EXONERATED
Operational Directive No 74, Lethal Force/Incidents Resulting in Death or Great Bodily Injury - UNFOUNDED
Operational Directive No 75, Use of Lethal Force - UNFOUNDED
Bulletin No 08-07, Taser Less-Lethal Weapon Policy - SUSTAINED

F. BART POLICE OFFICER JON WOFFINDEN

1. Background

Jon Woffinden was not interviewed by BART on the night of the incident, but asked to do a police report instead. He was thereafter interviewed by the Alameda County District Attorneys Office on January 20, 2009 as part of the criminal investigation into the shooting. He testified at the criminal Preliminary Hearing on May 20 and May 26, 2009.

On May 19, 2009 and June 23, 2009 Chief Gee sent letters to Officer Woffinden alerting him to his possible violations of policy, his potential role as a witness and ordering him to talk to BART's investigator Kim Colwell. Thereafter he was interviewed by Kim Colwell of Meyers Nave on July 7, 2009 as part of the Internal Affairs Investigation. He appeared at the offices of Meyers Nave, was given his Miranda rights and a Lybarger Admonition and then chose to speak freely. He was represented by his attorney Alison Berry Wilkinson. His letters from Chief Gee, Lybarger Admonishment and interview transcripts are attached as Exhibit 43.

2. Law Enforcement Experience/Training

Officer Woffinden has been a BART Police officer for two years. Before that he was a police officer with the City of Pleasanton for eight years and was with the City of Moraga for the eighteen months before that. He completed the police academy at Los Medanos College.

After coming to BART Officer Woffinden was placed in a Field Training Program for approximately 12 weeks and then took up duties as a regular officer. He had worked the 2008 New Year's schedule on BART. He describes that event as "chaotic" with people "drunk and violent" (IA page 6).

Other than increased staffing and partnering, Officer Woffinden describes an absence of training or planning by BART to prepare the officers for the New Year's 2009 event. He says the alerts were mostly from officers talking among themselves about what kinds of things happened at BART on New Year's.

3. Other New Year's Calls

Officer Woffinden was partnered with Officer Mehserle. They teamed up at 8:00 p.m. at Lake Merritt headquarters. The first call of significance that they responded to was for an individual with a gun at the West Oakland Station. The suspect jumped off the platform and Officers Woffinden and Mehserle arrived just after the suspect hit the ground. They and a few other officers responded to the location of the suspect. Officer Woffinden helped hold the suspect down until they could search him and have a medical team look at him. Officer Woffinden saw them recover a gun, drugs and cash from the suspect. Just after making that observation they had to leave to respond to the Fruitvale call.

4. Fruitvale Station

Officer Woffinden recalls the radio broadcast as saying there was a fight on the train or in the Station. He does not recall hearing any description and did not know what officers were already there (IA pg 13-14).

When they responded Officer Woffinden recalls that he was thinking about the gun recovered at West Oakland and about an earlier call for a suspect with a gun at Embarcadero. He believed this was the same train running from Embarcadero to West Oakland and then Fruitvale. (We now know this is not the case, it was a different train.)

Officer Woffinden believes they were at West Oakland for 4-5 minutes and then it took them 5-6 minutes to get to Fruitvale. During the drive they heard calls coming from the officers with a "lot of yelling and screaming in the background" (PH V2 pg 105). They parked in the bus zone and the Station agent pointed them to the platform where the incident was occurring. He and Officer Mehserle went up the steps one behind the other (IA pg 16-17). He was scared as he went up the stairs (DA pg 18).

Prior to climbing the stairs he could hear yelling and screaming over the radio coming from Fruitvale. Once at the top of the stairs he observed Officer Domenici standing watch over 4-5 people sitting on the ground (DA pg 9). He also recalls Officer Pirone standing over the individuals with Domenici (DA pg 10). The detainees were all sitting at that time (PH V2 pg 139). He then looked back over his shoulder and saw another 4-5 black males, in their 20's, yelling and screaming (IA pg 18). He did not know if they were yelling at the officers, the detainees or someone else (PH V2 pg 107).

He assumed the group seated in front of Officer Domenici were involved. He didn't know the relationship of the other individuals. He believed the group of 4-5 standing were slowly walking towards Officers Domenici and Pirone and so he pulled out his baton and placed himself between them, forming a "scrimmage line" (IA pg 21). He held his baton under his arm at "low ready" (IA pg 24). These individuals exhibited aggressive behavior towards Woffinden, including "stiff arms" and "clenched fists" (IA pg 74). One of that group took a bladed stance, but he doesn't recall which one, although it wasn't Anicete (IA pg 75). Officer Woffinden stood with his back to the seated detainees who he estimates were about 8-10 feet away. The others in front of him went back and forth between 2-5 feet (IA pg 26). He told them to "back up" and then to "back the fuck up." Neither command worked (IA pg 26) (PH V2 pg 113). This scared him (DA pg 18). However none of the males in front of him ever advanced past him. Officer Woffinden heard yelling and swearing coming from all around him during the incident. He could also hear Officers Pirone and Mehserle

behind him both shouting commands at the detainees (PH V2 pg 158) (PH V3 pg 29). They were shouting at the detainees to "Get down and shut up" (PH V3 pg 29) (PH V3 pg 29).

While he established the perimeter Officer Woffinden would look back over his shoulder to check on Pirone and Mehserle who were dealing with the detainees. Occasionally he would see a couple of the detainees trying to get up from the seated position on the ground (IA pg 27-28).

Although he saw the detainees trying to get up, he did not go to help Mehserle and Pirone because he was concerned about the people in front of him. At one point Officer Woffinden described "3-400" people on the platform in front of him "yelling, screaming and taunting" (IA pg 28). When pressed, Officer Woffinden acknowledges he's "seen the videos" and knows there were probably not that many but more like "a hundred to two hundred maybe" (IA pg 29). (This is not accurate either when the video is compared to his testimony). Also at the Preliminary Hearing he acknowledged that the great number of people weren't threatening him, only the 4-5 in front of him (PH V2 pg 140).

At some point during this and before the shot was fired he radioed for more officers because he thought they were losing control (IA pg 30). He thought that they would need 20-30 more officers to keep control (PH V2 pg 162). In the DA interview he stated that he called for backup as soon as he established the perimeter (DA pg 10). It was too loud for him to hear any response on his radio (IA pg 31).

Also during this time he recalls Officer Domenici going back and forth between Woffinden and the Detainees (IA pg 31). She had her Taser out. (IA pg 32) (DA pg 9) (PH V2 pg 112). When she was near Woffinden she was about 4-5 feet from his right side facing the train (IA pg 32).

Officer Woffinden continued to maintain the perimeter, however, at that time people began to throw things at him including paper and a cell phone that smashed against a pillar. He had to duck out of the way of the cell phone (IA pg 37). He thinks an individual in a gray coat threw the cell phone (IA pg 38). (He appears to be describing A[redacted])

At this time he moved his baton from a low ready into a striking position. He felt at that time that "a baton strike was imminent" (IA 38 – 39) (DA pg 9) (PH V2 pg 142). Moving the baton to the high ready position seemed to stop the people in front of him from advancing (PH V2 pg 133). He then saw the person who he thought threw the phone get taken down by Officer Knudson (IA pg 39). This happened 3-4 feet in front of Woffinden (IA pg 41). Pirone and the detainees are 10-15 feet behind Woffinden (IA pg 42). He holsters his baton to assist Knudson with the handcuffing. The cuffing took 1-2 seconds (IA pg 44).

He also recalls looking back over his shoulder while holding the perimeter and seeing "all" of the detainees trying to get up several times. He could see that they were told to sit or put back down by officers Pirone and Mehserle (PH V2 pg 163) (PH V3 pg 29).

During the take down he hears a "popping noise" that he thinks is a Taser going off behind him. And then he hears people yelling that "They shot him, they fucking shot him" (IA pg 33). He looked back and saw Oscar Grant with blood coming from his mouth (IA pg 33). When he looked back after the shot he could see the back of Mehserle who appeared to be struggling with Grant's hands (IA pg 34-35) (DA pg 12).

After the shot and the cuffing that Woffinden does simultaneously with Knudson, Woffinden goes to deal with a loud individual who was sitting on the bench just to the north of Oscar Grant. He had to tell him to be quite so that they could hear their radios to get aid for Mr. Grant (IA 45-46).

At the bench dealing with the loud individual, Officer Mehserle walks up and he has "thousands of beads of sweat on his forehead. He face was flush and his eyes were as big as saucers" (IA pg 48). Officer Woffinden told Mehserle to "take a walk" (IA pg 48). In the DA interview Officer Woffinden testified that he also asked Officer Mehserle if he was "OK" to which Mehserle replied in the affirmative (DA pg 12). However, at the Preliminary Hearing he was asked if Mehserle said anything to him and he responded "No" (PH V2 pg 121). Mehserle then walked away. Woffinden talked to him the next night to check on his new baby, but nothing beyond that (IA pg 50). It all "was so fast" (DA pg 13).

Officer Woffinden saw Officer Guerra holding a gauze on Mr. Grant's back. Woffinden then takes the person from the bench downstairs with Officer Flores (IA pg 52). The individual was then placed in the back of a patrol car (IA 53). He then went to tape off the Station and told Officer Flores to start a crime scene log (IA pg 53).

5. Post Incident

Officer Woffinden was then taken back to Lake Merritt by a sergeant and rode with Officer Guerra. They did not discuss the incident (IA pg 55). He was seated in a conference room and Officer Tom Smith came to him to give him the number for LDF. He called them and was told they were already aware of the situation (IA pg 56).

He was left mostly alone but at one point Officer Lori Bush came to give him some food from the dispatch center's New Year's party (IA pg 57). At about 7:30-8:00 a.m. the Chief stopped by to say "good night, good job" (IA pg 57).

At about 8-9:00 a.m. Tom Smith told him to write a statement "not a police report" about what had occurred in "word perfect" and they would put it on a thumb drive which Sgt. Fueng said would be available to him. It was never made available (IA pg 58). Tom Smith proof read the statement. He was never asked to give an oral statement that night or at any time (IA pg 59). He was then allowed to leave at about 11-12:00 p.m. (IA pg 60).

Officer Woffinden was fist offered counseling by Officer Pirone in the week or two after the incident (IA pg 60-61). He thinks this and other things about the way he was treated were mishandled. He knows from his experience that after the incident he should have been sequestered. Should have been offered food and possibly a change of clothes. Offered to make calls to his wife. Offered counseling. Had a statement taken and been given a ride home (IA pg 61). None of this happened (IA pg 61).

He went back to work for a few days after the incident. He then got a call from Commander Gibson telling him "that for your own safety we're putting you on administrative leave" (IA pg 63-64). Commander Gibson called him and left messages for two or three weeks then stopped. The only other contact he had was unofficial calls from his friends at BART to see how he was doing (IA pg. 65).

He also got a call after the incident from Sgt. Fueng who told him they were having a private conversation about Mehserle, but Officer Woffinden could hear that they were on the speaker phone (IA pg 66-67).

6. Impressions/Conclusions

Officer Woffinden is a seasoned police officer who responded to a chaotic scene on the night of the incident. He consistently used good police tactics such as acting as a cover offer and establishing a perimeter for officer safety. He used his radio to call for backup and generally did his job well. If fault can be found with his conduct it is in the few inconstancies between his numerous statements, such as the varying testimony he gives on what, if anything Pirone and Mehserle said at times. These inconsistencies do not seem to belie a lack of truthfulness on his part, but they do suggest he may slightly tailor his testimony to the best effect. This interviewer also felt he had a slight tendency towards exaggeration, such as indicating there were 300-400 people yelling and screaming and taunting him (he later admitted that he was threatened by only 4-5 people).

That said, there is no doubt that Officer Woffinden acted in an appropriate manner in handling himself during this stressful incident. Even his use of swear words, although not technically in policy were used in a manner consistent with law enforcement standards in situations where normal commands get no response.

7. Recommendation

There is no discipline recommended for Officer Woffinden.

8. Findings

General Order No. III, General Duty Regulations - EXONERATED
General Order No. V, Weapons and Use of Force - EXONERATED
Operational Directive No 27, Code of Professional Conduct and Responsibilities for Peace Officers - EXONERATED
Operational Directive No 44, Processing and Handling Arrestees - EXONERATED
Operational Directive No 70, Delay of Revenue Trains - EXONERATED
Operational Directive No 74, Lethal Force/Incidents Resulting in Death or Great Bodily Injury - UNFOUNDED
Operational Directive No 75, Use of Lethal Force - UNFOUNDED
Bulletin No 08-07, Taser Less-Lethal Weapon Policy - UNFOUNDED

XIII. INSTITUTIONAL IMPROVEMENTS

The overall review of the officers' action on the platform and the follow up with both the officers and the detainees revealed a number of areas within the BART Police Department as a whole that can be improved. A summary of each of those areas and recommendations particular to each follows.

XIV. POLICIES/GENERAL ORDERS

In order to determine what, if any, polices may have been violated during the police response to this incident it became necessary to review the BART Policy Manual (which contained polices, general orders, standard operating procedures and the fire manual). Although we were not asked to comment on the policy manual in detail, we were asked to point out any problems we might perceive during our review. There are several problems with the policy manual.

First, despite the fact that it says on its cover that it was updated in January of 2008, there are many polices in the manual that are not updated.[16] We located policies from the late 1970s, 1980's and 1990's. Many of the policies have the signature of the Chief prior to Chief Gee displayed on the front, Chief H. E. Taylor. The manual as a whole needs a complete review and all of the policies should be updated at least on an annual basis. It should be kept in mind that this is a document that the BART Police officers should be trained on, receive updates to and to use as a reference to guide them in their daily activities.

XV. TRAIN TACTICS

BART PD Operational Directive No. 67, dated April 18, 1986, outlines the basic tactics to be used when searching a train. The protocols, if followed, allow for a methodical, well thought out plan as to how to handle a hazardous situation on a train. The protocols outlined in the directive were not followed in this incident. The protocols delineate "Hazardous Train Searches" from "Non-Hazardous Train Searches." The subject incident can best be described as a hazardous situation: large crowds, multiple combatants, etc. BART PD protocols state:

- Responding officers should be provided with "all" available information about the call.
- At least three officers should be dispatched to the scene when possible and outside agencies should be used if necessary.
- Officers should use available cover or concealment whenever possible, work as a team to disembark patrons, maintain Station perimeter, etc.
- Search the train using a "leap frog" tactic from door to door working as a team.

For unexplained reasons, these common sense protocols were ignored. These basic tactics should be reinforced with all BART PD officers and practiced and refined routinely.

XVI. TEAMWORK, SEPARATION AND CONTACT - COVER

The tactical concepts of "work as a team," "stay together" and "contact - cover" are well known to law enforcement. Yet, there was minimal evidence of these concepts being applied during this scenario. Pirone and Domenici worked independently of each other, thus, reducing their potential effectiveness and increasing their risk of being assaulted. While the environment of an incident can well cause officers to want to "rush" though the incident, police work is best done when working together as a team in a

[16] The index to the Operational Directives with dates of update is attached as Exhibit 44.

methodical fashion. Pirone and Domenici should have confronted a limited number of suspects, worked as a team, with one officer covering while the other searched and/or handcuffed the individual.

When other BART personnel arrived on scene, the methodical approach of contact/cover was still not used. There were at least four, possibly more, detained persons, none of whom were searched. A more effective tactic is to line up all detainees facing away from the officers. While one or more officers guard the detainees, one officer pulls one detainee to the rear of the other detainees and completes a thorough search. The searching officer then goes down the line searching each detainee in a slow, methodical manner. While this tactic takes more time, it ensures a high degree of coordination and slows the tactical event down to assert control.

Further, during this incident, the actions of most BART PD officers on scene appeared to be undefended and not in keeping with best practices of working as a team or contact-cover. Officers separated from each other, multiple officers attempted to search or control suspects, etc. The more chaotic the situation, the more finely controlled police tactics have to be practiced.

XVII. TACTICAL COMMUNICATION AND LEADERSHIP

The video of this incident was most telling about the lack of leadership and communication within BART PD. No one appeared to be in charge of the incident. Pirone, who is a SWAT member and was the first senior officer on-scene engaged in altercations, verbal exchanges, and arrest situations when he should have been the incident commander. Instead of antagonizing the situation, he should have calmed it by asserting command and control. He should have directed the activities of responding officers. He should not have been engaged with any detainee once other officers arrived on scene.

We reviewed no BART PD documents that addressed command and control issues. In this case, on-scene command and control by a supervisor or senior officer at the scene would have slowed down the scenario, provided officers with direction, forced officers to work as a team and limited force used. Further, it would have communicated to the detainees and the witnessing passengers that the BART PD was well in charge of the incident. Instead, the lack of command and control communicated there was no control. BART PD should develop and publish a policy-level document that outlines department expectations that supervisors and senior officers assert command and control over a situation as a primary responsibility. Policy documents should be developed to institutionalize the four "A's" of tactical leadership. Once command is established and / asserted, the leader must :

- Assess: Determine what is happening, tactical resources needed, potential threats, etc.
- Announce: Request additional resources. Provide a mental image of what is occurring and also provide direction to responding personnel.
- Assemble: Take command of the personnel on scene. Provide direction upon assemblage.
- Act: Enact the plan.

XVIII. TASER POLICY AND PROTOCOLS

It is noted that the BART PD policy and training, although POST approved, allows officers to carry the Taser on the strong side of the belt so long as the Taser is positioned for a cross draw with the off (weak) hand.[17] Although POST allows this method of carrying the Taser, having two similar feeling weapons, the Taser and the firearm, in close proximity is the less favored method in nation-wide best practices. Given all the confusion by the officers in this case about how to handle the Taser (both Pirone and Domenici changed hands after drawing the Taser; Flores didn't know how to draw it or store it very well and Mehserle says he intended to use the Taser not his firearm), BART PD should consider requiring a cross draw with the strong hand or a weak hand/weak side carry only for deployment. Industry experts opine that this will help prevent inadvertent deployment of the Taser when deadly force is intended and vice versa.

In examining some of the video, it was noted that the laser on the Taser was often pointed in unsafe directions, such as Officer Flores pointing the laser light of his Taser directly at Officer Knutdson. The safety rules for firearms also apply to Tasers and must be followed.

It is further noted that there were several instances reported in other unrelated police reports examined where BART PD officers, including Officer Pirone, deployed the Taser when they believe suspects may potentially be in possession of deadly weapons. The Taser is not a substitute for deadly force. If deadly resistance is anticipated, then the firearm should be deployed. If less than deadly resistance is anticipated, then the Taser may be deployed. The BART PD policy should be updated to reflect this enhancement. Further, these actions were reported in prior arrest reports, yet apparently not caught or commented upon by BART PD management. Arrest reports, particularly when force or threatened force is used, are a very useful tool to adjust and enhance tactics and manage risk. That was not achieved in this case. In the future, arrest reports should be more closely scrutinized.

We recommend that all BART officers receive additional training in the use of the Taser. Further, the training should include the concept of the "combative suspect control team." Under this tactical scheme, officers confronting a hostile person use a team approach when possible to handle that incident. Under the direction of a team leader, usually a sergeant, each officer deploys a different force option, such as a Taser, beanbag shotgun, deadly force and an arrest team. The officers then coordinate actions, using different force tools, to control the subject.

XIX. INTEGRATION OF TACTICAL CONCEPTS

The above tactical concepts are not stand alone recommendations. They must be integrated with each other to properly enhance the training of BART PD officers. For instance, officers should approach a scenario on a train by applying the four "A's" and not by becoming involved in separate incidents. If they

[17] The policy itself appears to be copied directly from the Lexipol Service. No other policy appears to be in that format. It is unknown if BART PD has purchased the Lexipol policies, and if so, why other updates were not used. The policy itself is also a copy and thus does not appear to be tailored specifically to BART PD (see Exhibit 8).

confront multiple suspects, then additional resources should be immediately requested. While awaiting those resources, the officers should work as a team and remain in a position of advantage. When other resources arrive, one officer must assume the role of the incident commander, and direct the responding officers to take various actions such as search suspects, locate witnesses, etc. Additionally, the detention, search and ultimately the arrests of the suspects must be achieved in a methodical ways previously described.

Furthermore the Taser is only a singular force option that should be integrated into the tactical mesh of the operation. It is not a stand alone force tool. It is part of the smorgasbord of force options that should be available to the officers confronting the suspects. BART PD should be trained in the combative suspect control team concept, again establishing on-scene command and control. This scenario will provide BART PD officers with tactical skills to deal with violent and aggressive subjects, and also to slow the tactical scenario down to assert command and control over it.

XX. COMMUNICATIONS AND SUPERVISORY RESPONSE

Communications failures were prominent during this incident. The information provided by the train operator provided little insight to the responding officers. In effect, Pirone and Domenici responded to the call of a disturbance without having a firm picture of what was taking place. Based on the radio traffic and the interviews it remains unclear if the right persons were detained, and in any event the officers had to determine that during very difficult circumstances. Further, BART PD dispatch should insist on obtaining additional information to provide responding officers with more information to better plan tactical responses. This incident was examined for not only what occurred but for what did not occur. It is noted that in spite of the rapidly escalating nature of this situation that was evident on the radio, there were no BART PD supervisors on scene.

In this case, Central Dispatch learned that Oakland Police were needed as did other responding BART PD officers. The escalation of the incident should have prompted a response by supervision to assume command and control of this situation. BART PD provided no documentation that spoke to the expectations of supervision to establish on-scene command and control of such incidents. Plainly put, the expectation of supervision must be that they respond to tactical events, assume command of those events and assert field level control. In this case, a competent supervisor would have proven invaluable in controlling the scene, managing resources, directing the force actions by officers, etc. Instead, the situation had no apparent leadership. Senior BART PD staff must communicate the expectation of field level supervision asserting command and control of the tactical situation.

XXI. USE OF FORCE REPORTING

The institutional practices of reporting use of force incidents within BART PD are substandard. Current policy only requires officers to report to a supervisor when they use force only in those circumstances where significant force was used. That policy allows for officers to immediately report the use of force or if necessary, report it before the end of watch. In practice, it allows officers to wait to report the force after the salient witnesses have left the scene. Further, there is no mandated commentary about the actions of field supervisors at the scene of a use of force incident.

This presents many problems. First, the definition of use of force must be enhanced to include the type of force applied by the officer, not the expected outcome. Personnel complaints emanating from use of force incidents not related to this incident were part of the materials reviewed. In two of those cases, the subject of the force suffered some sort of minor facial injuries, yet the complaints were not sustained and no further actions were taken by BART PD management. There was evidence in both cases to prove there was force used and not reported. These investigations were missed risk management opportunities. This use of force reporting protocol tacitly allows officers to use force and not report it. Pirone's actions on the night of this incident are most likely a direct outcropping of this policy failure. It appears from the record that Pirone did not intend to report the force he used on this evening and did not intend to arrest Grant for the so called "assault" on Domenici. The reporting policies and protocols by BART PD laid the framework for this kind of policing.

One of the use of force incidents examined involved the complainant being forcefully thrown to the ground by the officer. The suspect admitted to attempting to choke the officer and alleged that he too, was choked by the officer. The accused officer admitted to throwing the complainant to the ground, but ultimately only wrote the complainant a ticket. The personnel complaint adjudication made no finding about the lack of reporting of the force or even recognized the risk management implications. Further, a suspect attempted to choke a police officer, yet was not arrested for this felony crime. Management appears to have read this report and not recognize any issues with it including unreported use of force, failure to arrest for a felony, etc.

Uses of force must be investigated more thoroughly. When a use of force incident occurs, a supervisor should respond and conduct an immediate on-scene investigation. The scene should be canvassed for witnesses and evidence, such as video. Further, if a supervisor is there during a use of force incident, the actions of the supervisor should also be subject to review.

The BART PD limits its use of force findings to justifiable and not justifiable. It is not known when the last unjustifiable use of force occurred within BART PD, however, the force used is only part of the equation. The tactics leading up to, during and after the use of force incident are critical to the evolution of the incident itself. The tactics of the involved officer often have a direct impact on the outcome or even the decision to use force. Those tactics should be reviewed and commented upon in every use of force incident.

Further, the quality of the police report of the use of force as well as the Constitutional implications should be addressed in each use of force. The evidence obtained during the use of force investigation then, becomes a biopsy and opportunity for improvement by the BART PD. Further, a more robust investigation and examination of the tactics, reporting and use of force will provide the community with a greater sense of comfort that BART PD is using reasonable force.

In every case, the use of force incident should be debriefed with the involved officers. In cases where officers were deficient, the BART PD must make a decision to either remediate and retrain the officer or discharge the officer.

Use of force incidents should be used as a biopsy of the operations of the BART PD and serve as a barometer to the Chief of Police on the condition of the agency. The limited reporting requirements of the BART PD provide the Chief of Police with very little information about what is happening in the field. The Chief of Police should review and approve all use of force incidents generated by BART PD.

XXII. DEADLY FORCE INVESTIGATIONS

It is understood that BART PD has had very few deadly force situations in its history. Because of that, there were some decisions made that could be improved upon in the future. Specifically, Officer Mehserle was not interviewed prior to ending his workday. In spite of the fact that he was tired and had worked all night, he should have been given the Lybarger Admonition, allowed access to counsel, and ordered to make a statement, however minimal, to define the parameters of the anticipated administrative investigation. Because he was not required to provide a statement, this investigation was unable to definitively determine if his shooting of Grant was an intentional discharge of his firearm in the belief that a deadly force situation was present or an unintentional pulling of the firearm when a Taser was the intended tool.

Further, this investigation noted that Mehserle was allowed to view a video tape of this incident prior to being interviewed. This practice is not recommended. The intent of the use of force investigation is to determine the shooting officer's perception (state of mind) relative to use of deadly force. Once a video tape is introduced and viewed, it is not known if the officer will provide their perception of the incident or unintentionally fill in gaps in their memory using the video and a provide inaccurate accounting of the incident or fabricate a story to match the circumstances.

Some other percipient witness officers were not interviewed on the night of the incident. Those officers too should have been given the Lybarger Admonition, afforded the right to a legal representative and interviewed to define their roles in the events of the incident. The psychological implications of being involved in a deadly force incident are profound. It is understood that officers involved in a deadly force situation will have a very fragmented and oftentimes very narrow memory of the incident. An effective investigation will make sense of that memory. Allowing involved officers to view video prior to an interview allows them to either subconsciously fill in the blanks where there are no memories of the incident or preplan for alibis for substandard conduct. Either way, allowing officers to view video of the event prior to the interview erodes the public's faith in the process and unnecessarily impacts the investigation.

Many of the involved officers also indicated they were not informed of their right to counsel, or in one case strongly discouraged from getting an attorney as it "would make matters worse." BART PD officers should not be discouraged from consulting with counsel and command staff should never indicate that asserting the right to counsel will have detrimental effects for the officer. This is a practice that must change immediately.

Also of note is the fact that Pirone did not report his use of force during the interview, nor did other officers report that they observed force. Because current BART PD policy is only concerned with judging the use of force, specifically, substantial force, the other actions of the involved officers were not adequately probed. Once tactics, supervisory actions, and lawfulness of the encounter are added to the adjudication scheme, these issues will become apparent.

Further, the interviews of the involved officers were tightly confined, by both BART PD as well as other interviewers, to the use of force. In many cases, interviewers interrupted the officer, asked leading questions, or otherwise did not probe the actions of the officers. The interviews were inadequate on the whole. The interviews of involved officers should probe their actions, from start to finish, and require the reporting of use of force or any misconduct they witness.

Similarly the interviews of the witnesses, detainees, train operator and the like were deficient. Again the interviews were too confined in their area of review. They also frequently used leading questions instead of letting the person "tell their story" and then going back to clarify all the issues. A training of all investigating officers in investigations and critical incident investigation is strongly suggested.

It was also noted that BART PD requested a peer support person to attend Mehserle only to have that support officer questioned by the Alameda County District Attorney's Office. While the practice of questioning a peer member may be lawful, it is not recommended. In most cases, officers deploy deadly force under circumstances when they are in imminent danger of death themselves. Deadly force encounters are exceptionally emotional and difficult times for officers. Support officers as well as involved officers should be aware that their relationship is not one with legal communications privilege. Their communications, even spontaneous utterances by the involved officer may be questioned later. If BART PD believes that peer support officers are absolutely necessary, those support officers should be minimally trained to advise the involved officer to not attempt to discuss the incident. Further, support officers should not be required to reveal conversations made during administrative investigations. If no agreements can be made relative to support officers, then the practice should be discontinued.

Additionally, in instances where an officer uses deadly force against a suspect and the suspect dies or has a chance of dying, that officer should be mandatorily referred to a psychologist. Mandatory referral with remove the stigma of "going to the shrink" and become an accepted practice. All of the officers relate stories of offers of counseling being delayed, deferred to others to communicate, or just not happening. This is an unacceptable practice. BART PD should mandate that the involved officer as well as affected percipient witness officers be provided counseling within 48 hours of the incident.

Finally, the selection to head the Internal Affairs Investigation was unsuitable, as the individual did not have the level of experience needed for this kind of review. Although the Lieutenant selected is an intelligent, dedicated and hard working individual, he was not qualified to take the helm of an Internal Affairs Investigation of this magnitude on January 1, 2009. At the time of his assignment he was still a Patrol Watch Commander with an upcoming transfer to Internal Affairs. Prior to January 2009 he had only done a few small Internal Affairs Investigations as part of BART's standard supervisor training. He had attended a POST certified IA school in 1998 or 1999, however, a decade had passed between then and the major incident in this case. Command staff should have selected a more experienced individual to head the Internal Affairs Investigation in this case.

XXIII. DUTY TO REPORT

It is noted that although Officer Pirone struck Mr. Grant more than once, those actions were not reported by Domenici, Guerra, Pirone or any other officer. While the tightly confined definition of a reportable use of force may have contributed to this, the fact is that a punch or strike is significant. These facts were not

disclosed during initial questioning or in statements by the officers. BART PD policy should be amended to specifically include a statement that officers have a duty to report all pertinent facts known to them, including potential uses of force by their peers. Further, failure to report misconduct should itself be viewed as serious misconduct by BART PD.

XXIV. PERSONNEL COMPLAINT INVESTIGATIONS

The personnel complaints that were examined were of concern. As previously mentioned, there were at least two separate incidents where complaints alleged officers unnecessarily used force on them. While this is not uncommon, it should be noted that in both instances, the complainant had visible injuries to their faces. In both cases the officers admitted to using force, but because of the tightly confined definition of reportable use of force, no actions were taken. Hence, there were at least two incidents where members of the public were subjected to some sort of force by officers and little or no on-scene investigation took place, and the personnel complaint missed the opportunity to identify this as a possible problem.

The conduct of use force investigations and personnel complaint investigations by BART PD may have contributed to the Grant Incident. Had officers on the scene of the Grant incident known that BART PD would relentlessly investigate use of force incidents, including pulling of video and canvassing the scene, it is doubtful that people would have been punched or kicked when it did not appear reasonable to do so. There was no rigorous institutional reporting mechanism to require reporting and officers were left to their own devices and reporting thresholds. And, there were no consequences for under-reporting the use of force incident.

Personnel complaints should be used as a risk management tool to not only examine the actions of the officers, but the policies of the BART PD. The few complaints examined clearly exposed a system where a community member could be injured, reasonably or unreasonably, yet it appears that no supervisory intervention was taken and no analysis was done to determine how to prevent such recurrences. If this is true then this must be changed. Further, the pattern of conduct by police officers should be examined in the adjudication of the personnel complaint. Officers' conduct over a period of time will provide the BART PD with a very strong sense of training needs and possibly, the decision to retain an employee.

XXV. TRANSPARENCY AND ACCOUNTABILITY

The reporting requirements and quality of the reports by BART PD with respect to force and misconduct do not invite transparency. An independent evaluator would have noticed these deficiencies and changes could have been made before this incident occurred. The lack of significant reporting of use of force incidents, lack of critical analysis in personnel complaints, limited reporting requirements, no on-scene investigations, etc. contributed to the events on the morning of January 1, 2009. Best practices require other actions.

BART should consider retaining a reputable auditing or oversight firm, with experience in police matters, to conduct on-going meaningful audits and evaluations of BART PD. These audits and reports should be considered to be made available to the public.

The greater the degree of transparency by BART PD, the better the agency will become. External audits and the responses to those audits are the basis for steady improvement that all police agencies desire. While the process is often difficult and burdensome, the fruit of such efforts will be worth it. The public will have a greater sense of comfort in the BART PD and the agency will constantly evolve towards excellence. If BART opts to develop a review committee to oversee BART PD policy, the committee must be highly versed in police issues and be as free from political interference as is reasonably possible. Such committees should be fully versed in use of force issues such as *Graham v. Connor* and understand that policing is a very inexact craft practiced under rapidly changing and often escalating and chaotic circumstances.

XXVI. CRISIS COMMUNICATIONS

Every law enforcement agency must be prepared for circumstances when the agency has a shooting or other critical incident that becomes the focus of public outrage. It is in the agency's best interests and the public's best interests that the subsequent investigation of that incident be as transparent as possible. Further, a highly refined investigative processes put in place, coupled with the comfort that there is outside monitoring of the investigation will provide the community with a sense that the agency will conduct an honest and forthright investigation and analysis of the incident. Further, the entire agency's investigative and adjudicative process should be described to the media and the community who should be provided as much information about the incident as reasonably possible. Frequent updates to the local politicians, clergy, community leaders and media will further provide the community with the sense that the investigation if going according to plan and is transparent in all aspects. In all cases, the communications of the adjudication protocols and transparency of the process, not necessarily all the facts, are what the public desires to know. That, followed up with responsible police management decision and improvements, will provide the much needed salve for the community concerns.

XXVII. DETENTION METHODS

The detainees all describe being held in police cars for extended periods of time and then some in offices and some in cells for even more time. They have as a group all opined that they were in handcuffs for between four and six hours. This is far too long to be handcuffed in even the most egregious situation.

The detainees were all told when interviewed that they "were not under arrest" and were "free to go." This characterization of their detention status could not have been understood if they were held for hours and in handcuffs.

BART PD should rework their detention policies (no written policy was located) to afford a more expedient turn around of detainees, better conditions for their physical detention and certainly not keep people handcuffed for between four to six hours.

XXVIII. FINAL RECOMMENDATIONS

It is important for BART PD, including officers, supervisors and managers to learn valuable lessons from the Oscar Grant situation. The tactics of BART PD at the field level were seriously deficient. It is recommend that all officers receive a tactical debrief of the incident emphasizing learning points during that

incident. The debriefing could use available video and PowerPoint presentations to paint a picture of the events as they emerged that night. In a non-punitive environment of a debriefing, all officers should be encouraged to identify the tactical strengths of the situation and areas where improvement was needed. Specific tactical decisions made during the incident should be analyzed along the continuum of those decisions. At each decision point, alternatives should be explored with the officers so that future decisions are better made.

Properly done, a tactical debriefing will teach officers to identify their own mistakes and improve future performance. Further, it is recommended that BART PD institutionalize a tactical debriefing in all possible scenarios to enhance future performance. One recommended method is known as the Tactical Operations Loop of Continual Improvement. Using this simple exercise, future performance may be enhanced. The loop consists of preplanning for an event, rehearsing for an event, performing at the event and then debriefing to enhance future performance. Under this scheme, officers or trainers imagine potential dangerous scenarios that officers may face. Officers then pre-plan their tactics by using "what if" scenarios. Once the preplanning is completed, officers then rehearse by going through the motions of the event, either physically or mentally, in a formal or informal setting, to test their preplanning assumptions and preparations. When an incident occurs, officers will have pre-loaded their tactical actions allowing them to perform at a higher level than if they had to develop a tactical response in the middle of a critical event.

Once an event has come to a conclusion, officers then debrief the incident, examining the incident in retrospect with the mindset of doing better the next time around. BART PD should consider adopting this or another method of continuous improvement. By institutionalizing review and evaluation of use of force incidents as well as personnel complaints, it institutionalizes the continuous loop of improvement.

There were ample warning signs of an impending problem within BART PD. For example, Officer Mehserle reported 6 use of force incidents in 2008 which was more than any other officer on the platform and more than most other BART PD officers in that year. Management must overhaul nearly all its critical reporting mechanisms to include a more transparent examination of the events to ensure future problems are identified. The use of force reporting policy as well as surface level examination of complaints contributed to the Grant situation. Policies should be developed, using best practices from other agencies and professional organizations, which will dramatically enhance the risk management practices of BART PD.

Further, high risk reports, such as uses of force and personnel complaints should have chief-level review. Considering the low number of complaints and uses of force per year by BART PD, it is not too much to expect that the Chief be briefed on all occurrences.

Finally, the BART PD Policy Manual needs substantial revision. While it largely meets POST standards and addresses the many "how" questions, it does not address the "why" questions. The policy manual should not only address technical competence, but also explicitly communicate the values of the organization. The policies should be framed in such a way as to institutionalize these values (thought debriefs, continual improvement, management review of critical incidents, etc.).

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professional law corporation

Kimberly E. Colwell
Attorney at Law

MEMORANDUM

CONFIDENTIAL COMMUNICATION

DATE: August 4, 2009

TO: ~~Matthew H. Burrows, General Counsel~~
Andrea Ravas, Associate General Counsel
Dorothy Dugger, General Manager
Gary Gee, Chief of Police

FROM: Kimberly E. Colwell, Esq.

RE: **Follow-Up to BART Internal Investigation re January 1, 2009 Fruitvale BART Station (Oscar Grant) Incident**

Following my conversation with Andrea Ravas earlier today, and my conference call with Ms. Ravas, Commander White and Commander Gibson, I herein identify specific sections of General Order III which our Internal Affairs Report found [redacted] Officer Pirone to have violated. (See IA Report 7/31/09 pages 59-60 and 79-80; and Exhibit 1 to IA Report.) Those subsections of General Order III are as follows:

Officer Pirone
3.000
3.001
3.030
3.150
3.270
3.271
3.300
3.320
3.321
3.358

[redacted]

I hope this gives you the clarification you need. Please do not hesitate to contact me if you have any additional questions.

KEC:edl
c: Jayne W. Williams, Esq.
1275228.1

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Kimberly E. Colwell
Attorney at Law

MEMORANDUM

CONFIDENTIAL COMMUNICATION

DATE: August 5, 2009

TO: Matthew H. Burrows, General Counsel
Andrea Ravas, Associate General Counsel
Dorothy Dugger, General Manager
Gary Gee, Chief of Police

FROM: Kimberly E. Colwell, Esq.

RE: **Second Follow-Up to BART Internal Investigation re January 1, 2009 Fruitvale BART Station (Oscar Grant) Incident**

Following the phone message from Andrea Ravas of late yesterday, and her communicating to me the request of Commander White, I herein identify specific sections of General Order V and Operational Directives 27 and 44 which our Internal Affairs Report found Officer Pirone to have violated. (See IA Report 7/31/09 pages 79-80; and Exhibits 2, 3 and 4 to IA Report.) The applicable subsections of those policies are as follows:

Officer Pirone
General Order V – 5.000
Operational Directive 27 – Purpose and Canons 1, 2, 3, 4, 5 and 6
Operational Directive 44 – I and II

I hope this gives you the additional clarification you need. Please do not hesitate to contact me if you have any questions.

KEC:edl
c: Jayne W. Williams, Esq.
1276139_1.DOC

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Kimberly E. Colwell
Attorney at Law

MEMORANDUM

CONFIDENTIAL COMMUNICATION

DATE: August 5, 2009

TO: Matthew H. Burrows, General Counsel
Andrea Ravas, Associate General Counsel
Dorothy Dugger, General Manager
Gary Gee, Chief of Police

FROM: Kimberly E. Colwell, Esq.

RE: **Third Follow-Up to BART Internal Investigation re January 1, 2009 Fruitvale BART Station (Oscar Grant) Incident**

Following a telephone discussion with Andrea Ravas of this morning, and her communicating to me the request of Commander White, I herein identify specific sections of Bulletin No. 08-70, Taser Policy of BART PD, which our Internal Affairs Report found Officer Pirone to have violated. (See IA Report 7/31/09 pages 79-80; and Exhibit 8 to IA Report.) The applicable subsections of the policy are as follows:

Officer Pirone
Bulletin No. 08-70 – 309.3 and 309.4

Please do not hesitate to contact me if you have any questions.

KEC:edl
c: Jayne W. Williams, Esq.
1276260.1

WILLIAM E. RIKER, Arbitrator

[redacted]

IN ARBITRATION PROCEEDINGS

BEFORE ARBITRATOR WILLIAM E. RIKER

In the Matter of the Arbitration Hearing Between THE BAY AREA RAPID TRANSIT DISTRICT, and THE BART POLICE OFFICER'S ASSOCIATION (Termination of Marysol Domenici) Grievant.	DECISION AND AWARD CSMCS Case No. ARB-09-0644

This matter came on regularly for hearing before Arbitrator William E. Riker, pursuant to the disciplinary appeals procedure contained in the Memorandum of Understanding between the Bay Area Rapid Transit District and the BART Police Officers Association. The issue presented was whether just cause for the termination of Officer MarySol Domenici existed; if not, what shall be the remedy.

The events giving rise to this disciplinary appeal all occurred on the Fruitvale Platform in the early morning hours of January 1, 2009. Over the fourteen (14) days of hearing both sides presented volumes of documentary evidence, a significant amount of video combined with extensive analysis, and presented live testimony from numerous witnesses. The Arbitrator also participated in two site visits with the parties. After carefully considering all the facts, testimony, and evidence presented, the Arbitrator issues the following Decision and Award.

DECISION

The Arbitrator finds that just cause for the termination of Officer MarySol Domenici did not exist, and that the proper remedy is reinstatement with full back pay and benefits, as well as the removal of all findings inconsistent with this Decision from her personnel record.

The evidence submitted did not support the proffered allegations, and the District's reliance on the Administrative Investigation Report prepared by its outside consultants was misplaced. The Report did not contain a full vetting of the evidence as it related to the allegations against Officer Domenici, the investigators did not ask witnesses certain key and critical questions about the actions of Officer Domenici, and the analysis of the multitude of videos related to the allegations about Officer Domenici's conduct appears flawed. The Arbitrator finds, as a result, that the Report prepared by the outside consultants was not a full and complete investigation of Officer Domenici's actions, and that critical information necessary to the evaluation of whether Officer Domenici acted appropriately during the events of January 1, 2009 was not made available to the District by the investigators.

The most serious of the charges against Officer Domenici concerned whether she was truthful in her account of the events, and whether she accurately reported what she observed both when interviewed by investigators as well as during the testimony she provided at the Preliminary Hearing. The Arbitrator finds no basis for the conclusion that Officer Domenici was untruthful in her statements and testimony, and therefore holds that just cause does not exist for the finding that she violated General Order 3.358 – Cooperation in Investigation. The Arbitrator finds on the specific allegations of untruthfulness, as follows:

a. The Noise Level on the Platform: Officer Domenici was truthful when she described the noise level on the platform when she first arrived. Noise level is a subjective perception. Her perception that it was "very loud" is consistent with the fact that she arrived on the platform from the comparatively quiet area of the station agent's booth, and is consistent with the fact that when she arrived at the top of the escalators she encountered an eight-car train with its doors open containing a "crush load" of festive

people on their way home from celebrating the New Year. During the hearing, the Arbitrator, accompanied by the parties, conducted two site visits to the Fruitvale Station during non-commute week-day hours. During those visits, the noise level on the platform when passengers were disembarking the train was loud, even though the number of people present was considerably fewer than were at the Fruitvale Station on January 1, 2009. Based on these facts, the Arbitrator finds that the District did not sustain its burden of proof on this charge, and that just cause to find Officer Domenici untruthful did not exist.

b. The "Catcher's Stance": Officer Domenici was mistaken, but not untruthful, when she stated that Oscar Grant never got lower than a "catcher's stance" before the handcuffing of Michael Greer. During the arbitration hearing, one of the outside consultant's investigators testified that Officer Domenici was correct in stating that Oscar Grant lowered himself to a "catcher's stance", but was wrong about when it occurred. That investigator also testified that it is common for witnesses in a rapidly unfolding and highly intense circumstance to remember events out of sequence. The Arbitrator agrees. Many of the witnesses that gave statements during the investigation, as well as others who testified at this hearing, suffered from the same affliction. The Arbitrator thus finds that Officer Domenici was truthful about her recollection, even if it was mistaken.

c. The Crowd's Hostility: The District charged Officer Domenici with being untruthful during her interview statements and at the Preliminary Hearing when she described the crowd as "hostile" toward her and Officer Pirone prior to the handcuffing of Michael Greer. That allegation is unfounded. A review of her statements and the testimony provided shows that Officer Domenici never used the word "hostile" to describe the crowd's demeanor prior to the handcuffing of Michael Greer. Rather, during her testimony and in her prior statements Officer Domenici described the crowd during the period prior to the handcuffing of Michael Greer as "singing" as she ran past, "having

a good time", and that they just wanted to go home; but that the crowd's demeanor thereafter changed when Michael Greer was removed from the train.

d. The Degree of Force Used on Michael Greer: Officer Domenici was charged with being untruthful about the degree of force exerted by Officer Pirone in taking Michael Greer into custody and handcuffing him. The Arbitrator finds that Officer Domenici truthfully reported those limited portions of the interaction that she was in a position to observe. The witness testimony and video evidence revealed that Officer Domenici's back was to the train at the time that Officer Pirone removed Michael Greer; that Officer Domenici's primary focus of attention at the time Mr. Greer was removed from the train was on the four individuals detained against the wall; and that Officer Domenici only captured brief portions of the incident with Michael Greer during the quick glances she took over her shoulder in an effort to simultaneously monitor the removal process as well as the individuals who had been detained.

e. The Degree of Force Used on Oscar Grant: Officer Domenici was charged with being untruthful about the degree of force exerted by Officer Pirone against Oscar Grant. The Arbitrator finds that Officer Domenici truthfully reported those limited portions of the event that she was in a position to observe. This single allegation included two separate and distinct alleged uses of force by Officer Pirone: an alleged punch to the face, and an alleged knee strike to the head. The Arbitrator will address each separately.

i. The Alleged Punch: To resolve this allegation, the Arbitrator need not determine whether Officer Pirone actually "punched" Oscar Grant or whether the force used was excessive since he has determined that Officer Domenici was not in a position to see the force allegedly used. The Arbitrator finds that at the time of the alleged punch, Officer Domenici's focus of attention was fixed directly on detainee Jackie Bryson, Jr., that the contact between Officer Pirone and Oscar Grant occurred rapidly in her peripheral vision simultaneously with the focus of

her attention shifting from Jackie Bryson, Jr. to the three individuals approaching aggressively toward the detention area from her right side. The Arbitrator therefore finds that Officer Domenici was only in a position to see a limited portion of the encounter and that she truthfully reported what she did observe.

ii. The Alleged Knee Strike: To resolve this allegation, the Arbitrator need not determine whether Officer Pirone actually "kneed" Oscar Grant or whether the force used was excessive since he has determined that Officer Domenici was not in a position to see the force allegedly used. The video evidence reveals that Officer Domenici was not standing in the vicinity of the alleged knee strike. The evidence further showed that Officer Guerra was standing directly between Officer Domenici and the area where the alleged knee strike occurred. Officer Guerra testified that despite the fact he was standing almost directly in front of the alleged kneeing incident and in a position closer to the alleged event than Officer Domenici, Officer Guerra did not see what transpired between Oscar Grant and Officer Pirone because his focus, like that of Officer Domenici, was on the area to the right of the detention towards the approaching subjects who were aggressively challenging the officers. As a result, the Arbitrator finds that Officer Domenici was truthful in her statement that she did not see Officer Pirone knee Oscar Grant in the head.

f. The Use of Profanity by Officer Pirone: Officer Domenici was charged with being untruthful concerning Officer Pirone's use of profanity when he was attempting to locate Michael Greer and remove him from the train. This charge is unfounded. Officer Domenici never denied that Officer Pirone used profanity. In fact, Officer Domenici stated not only during the investigative interviews but also at the preliminary hearing that she heard Officer Pirone use curse words while removing

Michael Greer from the train, including that she heard Officer Pirone use the "F-word" during that time, and heard him state: "Get off the fucking train".

g. The Number of People on the Platform at the Time of Her Arrival: Officer Domenici was charged with being untruthful about whether there were people on the platform and/or coming off the train at the time she was running toward where Officer Pirone had the subjects detained against the wall. That allegation is unfounded. The platform video fails to depict the area in front of Officer Domenici towards which she was running and which was in her direct line of view. As amply demonstrated by the testimony of Michael Schott and the exhibits he prepared, the area where Officer Domenici states the people were located is completely out of the platform camera range and view. Indeed, the synchronization of the train operator's radio transmissions to the platform video emphasizes the flaw in relying solely upon the platform video for this charge. Additionally, the witness testimony about the area at the front of the train supports Officer Domenici's statements. As a result, this allegation is unfounded.

Other Related Allegations: The District also alleged that Officer Domenici violated General Order 3.000 (General Regulation), 3.001 (Knowledge of Laws and Regulations), and 3.005 (Reporting Violations Of Laws, Ordinances, Rules or Order.) For the reasons stated above, the Arbitrator finds that the District did not sustain its burden of proof on those alleged violations.

The District further alleged that Officer Domenici "knew and did not report" that Officer Pirone left a prisoner in the back of a squad car in violation of General Order 3.300. The Arbitrator finds that the District did not sustain its burden of proof on that charge. The evidence at the hearing revealed that the administrative investigation relied upon by the District failed to include or consider that immediately after the incident Officer Domenici observed Officer Pirone talking to Sergeant Alvarez, and that immediately thereafter Officer Pirone advised her that the sergeant had directed that the prisoner be released from the car. Based on that, the Arbitrator

finds that Officer Domenici reasonably believed that Officer Pirone had made the required report, and that no further report by her was necessary.

The District additionally alleged that Officer Domenici independently violated General Order 3.300 (Custody of Prisoners) by leaving an arrestee locked in a patrol car under the supervision of the station agent when she responded to the platform to assist Officer Pirone. The underlying facts of this charge are undisputed. Officer Pirone adjudged the individual unable to care for himself under Penal Code section 647(f), placed him under arrest and in handcuffs, then placed the subject in a locked patrol car for transport to jail. The subject was then left in that locked patrol car under the supervision of a station agent when dispatch reported that there was a fight on the train holding at the Fruitvale platform. Although the subject was not left unattended, the ultimate responsibility for the safety and protection of the individual was with the arresting officers, and that duty should not have been delegated to the station agent. The Arbitrator acknowledges that Officer Domenici was "between a rock and a hard place" when summoned by Officer Pirone to respond to the platform, and that she had to weigh the potential risk of harm to the prisoner if she left him in the care of the station agent against the potential risk of harm to her partner if she failed to promptly respond to assist him on the platform. The Arbitrator has also taken into consideration that this was not the only prisoner that was left unattended that night in other locked patrol cars, that the other officers involved in those other incidents were not disciplined for that violation. The Arbitrator further takes into account the testimony of the station agent who reported that other officers have made similar requests on prior occasions. Finally, the Arbitrator took into account that the witnesses called by BART to explain how the policy was violated each had different, and sometimes conflicting, interpretations of the procedural obligations imposed on Officer Domenici in this circumstance. The Arbitrator thus concludes that while a procedural violation occurred, it does not establish just cause for the termination, and recommends instead that a training advice, or counseling concerning departmental expectations be issued on this charge, and further recommends that BART provide

comprehensive remedial training to all of its officers on the obligations imposed by General Order 3.300.

AWARD

After a full review of the evidence, this Arbitrator finds that just cause for the termination of Officer MarySol Domenici did not exist, and that the proper remedy is reinstatement, subject to a full fitness for duty, without restrictions and with full back pay and benefits, as well as the removal of all findings inconsistent with the Decision from her personnel record.

The Arbitrator hereby retains jurisdiction over the implementation and enforcement of this Award.

IT IS SO ORDERED.

DATED: December 17, 2010



WILLIAM E. RIKER, ARBITRATOR